Supreme Court, U.S.
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92-1503

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

Kaiser Aluminum and Chemical Corporation, a Delaware corporation,

Petitioner,

vs.

Westinghouse Electric Corporation, a Pennsylvania corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Fourth Circuit Court of Appeals failed to apply controlling state law when it affirmed the district court's grant of respondent's Rule 12(b)(6) motion by holding that the complaint failed to state a strict products liability claim upon which relief could be granted under West Virginia law when the action pled in the complaint was for the negligent repair of a product and petitioner disavowed any intention to plead a claim for strict products liability.

II. Whether the Fourth Circuit Court of Appeals abridged petitioner's constitutional right to access to court when it affirmed the district court's grant of respondent's Rule 12(b)(6) motion by holding that the complaint failed to state a strict products liability claim upon which relief could be granted under West Virginia law

when the action pled in the complaint was for the negligent repair of a product and petitioner disavowed any intention to plead a claim for strict products liability.

LIST OF PARTIES TO THE PROCEEDING IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties[1] to the proceedings in the United

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[1] Kaiser Aluminum & Chemical Corporation is a subsidiary of Kaiser Aluminum Corporation. Its subsidiaries include: Alpart Farms, Ltd., Alpart Jamaica, Inc., Alumina Partners of Jamaica, Anglesey Aluminium Ltd., Kaiser Alumina Australia Corp., Kaiser Aluminium Europe Ltd., Kaiser Aluminum International, Inc., Kaiser Aluminum & Chemical International N.V., Kaiser Aluminum & Chemical of Canada Ltd., Kaiser Aluminum Properties, Inc., Kaiser Aluminum Technical Services, Inc., Kaiser Bauxite Co., Kaiser Center, Inc., Kaiser Center Properties, Kaiser Finance Corp., Kaiser Jamaica Bauxite Co., Kaiser Jamaica Corp., Oxnard Forge Die Co., Inc., Queensland Alumina Ltd., Strombus

(continued...)

States Court of Appeals for the Fourth Circuit.

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[1](...continued)
International Insurance Company, Ltd., Trochus Insurance Co., Ltd. and Volta Aluminium Co. Ltd.

Subsidiaries of Westinghouse Electric Corporation include: Aptus, Inc., Challenger Electrical Equipment Corporation, The Knoll Group, Inc., Longines-Wittnauer, Inc., Thermo King Corp., Westinghouse Broadcasting Co., Inc., Westinghouse Canada Inc., Westinghouse Puerto Rico, Inc., Westinghouse Electric S.A., Westinghouse Environmental and Geotechnical Services, Inc., Westinghouse Financial Services, Inc., Westinghouse Hanford Co., Westinghouse International Technology Corp., Westinghouse Overseas Service Corp., Westinghouse Savannah River Co., Inc., Westinghouse World Investment Corp., and Westinghouse Broadcasting Co.

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OPINIONS BELOW

The December 2, 1992 opinion of the Court of Appeals, whose judgments is herein sought to be reviewed, is reported at 981 F.2d 136 (4th Cir. 1992), and is reprinted in the separate Appendix to this Petition. See Appendix A, Tab 3. The prior decisions of the United States District Court for the Southern District of West Virginia, entered October 12, 1989, and September 10, 1990 are unreported decisions. They are reprinted in the Appendix to this Petition. See Appendix A, Tabs 1 and 2.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on December 2, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES RULES AND REGULATIONS INVOLVED

1. Federal Rule Civil Procedure 12(b)(6):

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted . . . .

2. Federal Rule Civil Procedure 8(a); (e)(1); (f):

> (a) A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim or third-party claim, shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief . . . .

(e)(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(f) All pleadings shall be so construed as to do substantial justice.

3. 28 U.S.C. § 1332(a):

The district court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between-

(1) Citizens of different States; . . .

4. United States Constitution, Amendment 1.

Congress shall make no law . . . abridging . . . the right . . . to petition the government for a redress of grievances.

5. 28 U.S.C. § 1254(1):

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

STATEMENT OF THE CASE

On November 17, 1988, petitioner Kaiser commenced this diversity action in the United States District Court for the Southern District of West Virginia pursuant to 28 U.S.C. § 1332 for respondent Westinghouse's negligent repair of a rotor component to a motor generator set used by Kaiser to generate electric power for its aluminum mill in Ravenswood, West Virginia. On April 18, 1989, respondent filed its motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief could be granted. Petitioner opposed the motion and briefing by the parties was completed on May 8, 1989. Judge Haden took the motion under advisement without benefit of oral argument.

On October 12, 1989, after completion of discovery and five days prior to trial, Judge Haden issued his order dismissing Kaiser's action based on the conclusion that the allegations of the complaint were

insufficient to state a claim. (Memorandum Opinion and Order, Appendix A, Tab 2.) In its Memorandum Opinion, the district court opined that Kaiser's right to recover would be governed by the strict liability principles enunciated in Star Furniture Co. v. Pulaski Furniture Co., 297 S.E.2d 854 (W.Va. 1982). The district court held that Kaiser's complaint failed to state a claim because it failed to include the words "sudden and calamitous event" and "inherent defect" in pleading its negligent repair cause of action. The district court also concluded that any damages sustained by Kaiser were contractual in nature and were therefore barred by the applicable statute of limitations.

Kaiser immediately moved the district court to amend its Findings and Judgment under Fed. R. Civ. P. 52(b) and 59(e). In its motion, Kaiser asserted that strict liability principles did not apply to this negligent repair claim, that Kaiser's complaint had clearly stated

a claim for negligent repair under West Virginia law, and that deposition testimony demonstrated that Kaiser could establish a prima facia case in support of its negligent repair claim. (Plaintiff's Memorandum in Support of its Rule 52(b) and 59(e) Motions, Appendix D, Tab 1.) After considering this motion for almost eleven months, the district court summarily denied it on September 10, 1990, without explanation. (Order, Appendix A, Tab 2.)

On November 20, 1990, petitioner appealed the district court's decision to the Fourth Circuit Court of Appeals. On December 2, 1992, a three-judge division of the Fourth Circuit affirmed the ruling of the district court. (Decision, Appendix A, Tab 3.) Petitioner then filed a motion for rehearing en banc, which was denied by the same three-judge division on January 7, 1993. (Order, Appendix C.) The Fourth Circuit's decision to affirm the dismissal was based on the premise that the

district court ". . . seems to have assumed that the action was one in strict liability in tort . . . ." (Decision, p. 4, Appendix A, Tab 3.) The Fourth Circuit *endorsed* this conclusion by agreeing with respondent's characterization of petitioner's complaint as stating a cause of action in strict products liability. Having determined that a complaint pleading a cause of action for negligent repair must satisfy the pleading elements of a cause of action in strict products liability, it became axiomatic that the complaint failed to state a strict products liability claim upon which relief could be granted.

Pursuant to 28 U.S.C. § 1254(1), petitioner now seeks certiorari review of this action, on the basis that both the district court and the Fourth Circuit have improperly ignored the plain allegations of petitioner's complaint stating a cause of action for negligent repair and have arbitrarily required petitioner to meet the

pleading requirements of a cause of action in strict products liability. Moreover, since the evidence in this case would not support a cause of action in strict products liability the Fourth Circuit's decision has effectively denied petitioner access to court in violation of the First Amendment to the U.S. Constitution.

Facts Relevant To Issues on Appeal

The relevant facts on appeal are those pled in petitioner's complaint (Complaint, Appendix D, Tab 2), and the facts set forth in the deposition testimony and physical evidence submitted by petitioner to the district court. (See Appendix D, Tabs 3-8.)[2] These facts

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[2] Rule 12(b) expressly states that if "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment . . . ." Kaiser submitted deposition (continued...)

demonstrate that petitioner clearly and unequivocally pleaded, and can prove, a negligent repair claim upon which relief can be granted under West Virginia law.

Kaiser's complaint alleges the following facts. Kaiser operates a manufacturing facility in Ravenswood, West Virginia, which includes a 168-inch hot mill for aluminum production. Electric power for this mill is generated through a "motor-generator" set, which includes a rotor.[3] (Complaint ¶¶ 5, 6, 7, Appendix D,

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[2](...continued)
testimony and a photo of the damaged rotor to the district court with its Memorandum of Law in Opposition to Defendant's Motion to Dismiss, and then filed additional deposition testimony in support of its Rule 52(b) and 59(e) motions. The district court did not exclude this deposition testimony or the photo.

[3] A rotor is comprised of electrical windings fitted onto a shaft. This particular rotor is several feet in diameter.

Tab 2.) Kaiser ordered a spare rotor from Westinghouse in 1976 to be used in the event of a failure of the original rotor. (Complaint ¶ 8, Appendix D, Tab 2.) Westinghouse delivered the spare rotor in 1978 or 1979. (Complaint ¶ 9, Appendix D, Tab 2.) Kaiser kept that spare rotor in storage until April of 1981 when it was installed into the motor generator set after the original rotor became inoperable. (Complaint ¶ 10, Appendix D, Tab 2.) After one day's use, the spare rotor was observed to be malfunctioning because it had loosened from and slipped horizontally on its shaft. (Complaint ¶ 10, Appendix D, Tab 2.) The slippage damaged the rotor when it came into contact with metal casing that surrounded the rotor. (Complaint ¶ ¶ 9 and 10, Appendix D, Tab 2.)

After the rotor malfunctioned in April 1981, Westinghouse immediately took possession of the spare rotor shaft and agreed to "fully correct and repair all

malfunctioning and damage that the spare rotor shaft component had experienced and sustained."[4] (Complaint ¶ 12, Appendix D, Tab 2.) Westinghouse failed to exercise reasonable care and performed its repairs negligently (by failing to perform critical diagnostic tests) and then returned the spare rotor to Kaiser. (Complaint ¶¶ 13, 14 and 15, Appendix D, Tab

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[4] The fact that Westinghouse originally manufactured this rotor does not convert Kaiser's negligent repair claims into a product liability action. As discussed infra, Kaiser's claims arise solely from Westinghouse's separate repair activities that took place in 1981, several years after manufacture. The electrical fault which caused Kaiser's damage occurred as a result of the contact with metal casing in April, 1981 or during the subsequent repairs. There is no evidence that the electrical fault existed when the rotor left the control of the manufacturer in 1978 or 1979.

2.) The spare rotor was then placed in storage again until December 3, 1987, when Kaiser installed it in the motor generator set due to damage to the original motor generator set. (Complaint ¶ 16, Appendix D, Tab 2.) When Kaiser attempted to energize the motor generator set, electrical failures occurred immediately in the spare rotor as a direct and proximate result of the negligent repairs by Westinghouse. (Complaint ¶¶ 17 and 18, Appendix D, Tab 2.) The electrical failures caused physical damage to the motor generator set and rendered Kaiser's 168-inch aluminum mill inoperable for approximately 10 days. (Complaint ¶ 9, Appendix D, Tab 2.) Kaiser suffered property damages and business interruption losses exceeding $1,000,000 as a result of the negligence of Westinghouse. (Complaint ¶¶ 16-20, Appendix D, Tab 2.)

Deposition testimony submitted to the district court established that Westinghouse assumed

responsibility for the repair of the subject rotor in 1981 (Misage Dep. Tr. Vol. II, pp. 37-38, Appendix D, Tab 3), knew that the subject rotor was a critical component in Kaiser's production process, (Merrill Dep. Tr., p. 13, Appendix D, Tab 4), and knew that an inability to operate the mill would result in substantial lost profits to Kaiser. (Misage Dep. Tr. Vol. I, p. 12, Appendix D, Tab 3.)

Moreover, Mr. Duane Alderman[5] testified at his deposition that he was within a few feet of the spare rotor when it was energized and failed. (Alderman Dep. Tr., pp. 158, 190, Appendix D, Tab 5.) Almost instantaneously, voltage "etching" (the sound of voltage

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[5] Mr. Alderman was the foreman of the crew responsible for installing the spare rotor into the motor generator set. The Alderman deposition testimony was submitted to the district court with Kaiser's motion to amend under Rules 52(b) and 59(3).

being discharged) (Alderman Dep. Tr., p. 163, Appendix D, Tab 5) was getting louder and louder and louder." (Alderman Dep. Tr., p. 161; Appendix D, Tab 5.) At that point, either fire or electrical voltage escaped from the rotor and spread across the concrete floor toward Mr. Alderman and his brother. (Alderman Dep. Tr., p. 161, Appendix D, Tab 5.) The Aldermans became surrounded by "an electrical fire caused by this voltage of 13,000 volts getting outside of where it was supposed to be contained." (Alderman Dep. Tr., pp. 165-66, Appendix D, Tab 5.) The electricity/fire was "just everywhere." (Alderman Dep. Tr., pp. 185-86, Appendix D, Tab 5.) Mr. Alderman's brother asked for help, and Mr. Alderman cautioned "stand still" because the escaping fire/electricity was all around them. (Alderman Dep. Tr., p. 161, Appendix D, Tab 5.)

Photographic evidence filed with the district court showed that the spare rotor suffered extensive and severe physical damage as a result of the sudden electrical failure. (See photos, Appendix D, Tab 6 and Tab 7, and repair cost document showing property damages in excess of $100,000, Appendix D, Tab 8.) As described by Duane Alderman, components of the spare rotor were "completely disintegrated" and destroyed." (Alderman Dep. Tr., pp. 173-74, Appendix D, Tab 5.)

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED BECAUSE THE FOURTH CIRCUIT HAS SO FAR DEPARTED FROM THE HOLDINGS OF THIS COURT AND OF THE WEST VIRGINIA SUPREME COURT OF APPEALS AS TO CALL FOR THIS COURT'S POWER OF SUPERVISION.

The dismissal of petitioner's complaint is in direct contradiction to controlling decisions of this Court pertaining to Rule 12(b)(6) motions and the pleading

requirements of Rule 8. In affirming the dismissal, the Fourth Circuit has ignored the allegations of petitioner's complaint which states facts sufficient to plead a claim for negligent repair under West Virginia law and, by imposing on petitioner the pleading requirements of a strict products liability claim, has effectively denied petitioner its constitutional right of access to the federal courts in a diversity matter.

A. A Complaint Should Not be Denied Unless it Appears Beyond Doubt that No Set of Facts Can Support an Actionable Claim.

Since this Court is reviewing a dismissal on the pleadings, it must take as true the material facts alleged in petitioner's complaint. Hishon v. King & Spalding, 104 S. Ct. 2229, 2232 (1984); Hospital Bldg. Co. v. Trustees of Rex Hospital, 96 S. Ct. 1848, 1850 (1976).

The federal rules expressly reject technical forms of code pleading and provide that a plaintiff's claim for relief need only contain a "short and plain

statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2) and 8(e)(1). The rules also mandate that all pleadings shall be so construed as to do substantial justice. Fed. R. Civ. P. 8(f). See Conley v. Gibson, 78 S. Ct. 99, 103 (1957) where this Court stated:

> The respondents also argue that the complaint failed to set forth specific facts to support its general allegations of discrimination and that its dismissal is therefore proper. The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is "a short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrate this. Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues. Following the simple guide of Rule 8(f) that "all pleadings shall be so

> construed as to do substantial justice," we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis. The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.

78 S. Ct. at 103. (Emphasis added.)

Based on the underlying principles of notice pleading as discussed in Conley, a Rule 12(b)(6) motion to dismiss for failure to state a claim "is viewed with disfavor and is rarely granted." 5A C. Wright and A. Miller, Federal Practice and Procedure, § 1357 (2nd Ed. 1990) at p. 321; see also Rex Hospital, supra at 1853. Thus, when considering such a motion, the district court is to deem as admitted all well-pleaded allegations of fact and the plaintiff is entitled to receive the benefit of all reasonable inferences therefrom. Scheuer v. Rhodes, 94 S. Ct. 1683, 1686 (1974); L.S. Good & Co. v.

H. Daroff & Sons, Inc., 263 F. Supp. 635, 645 (N.D. W. Va. 1967).

The caution surrounding Rule 12(b)(6) motions promotes the policy of making certain "that plaintiff is not improperly denied a right to have his claim adjudicated on the merits." 5A C. Wright and A. Miller, supra § 1349 at pp. 192-93.

Hence, the test established by this Court for considering a Rule 12(b)(6) motion to dismiss is as follows:

> . . . a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can provide no set of facts in support of his claim which would entitle him to relief.

Conley v. Gibson, supra at 102; see also Hishon v. King & Spalding, supra at 2232 ("a court may dismiss a complaint only if it is clear that no relief can be granted under any set of facts that could be proved consistent with the allegation"); McLain v. Real Estate

Bd., Inc., 100 S. Ct. 502, 511 (1980) ("[i]t is axiomatic that a complaint should not be dismissed unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief'"); Revene v. Charles County Comrs., 882 F.2d 870, 872 (4th Cir. 1989); Thompson v. Brotherhood of Sleeping Car Porters, 316 F.2d 191, 199 (4th Cir. 1963); Williams v. Wheeling Steel Corp., 266 F. Supp. 651, 654 (N.D. W. Va. 1967).

In Hospital Building Co. v. Trustees of Rex Hospital, 96 S. Ct. 1848 (1976), the Fourth Circuit had affirmed the district court's dismissal of a plaintiff's antitrust complaint pursuant to a Rule 12(b)(6) motion. This Court granted certiorari and held that the complaint, fairly read, adequately alleged a restraint of trade substantially affecting interstate commerce and that dismissal on the pleadings was therefore inappropriate. Moreover, dismissal was inappropriate

regardless of whether further proceedings in the case might demonstrate that respondent's conduct in fact involved no violations of law or no substantial effect on interstate commerce. Id. at 1853, n.5.

Certiorari should also be granted in this case. The Fourth Circuit's decision here reflects an unwillingness to apply the clear standard enunciated in Conley and repeated in Rex Hospital, and numerous other decisions for determining the sufficiency of a complaint. As hereinafter discussed, petitioner has carefully pled all of the requisite elements of a claim for negligent repair clearly recognized as actionable under West Virginia law.[6] Yet, the Fourth Circuit, in affirming the district court's Rule 12(b)(6) dismissal, has ignored the allegations of the complaint, the deposition testimony and physical evidence supporting those

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[6] There is no dispute that the issues in this diversity action are controlled by West Virginia law.

allegations, and has arbitrarily imposed upon petitioner the duty to meet the pleading requirements of a strict products liability claim, a separate and distinct cause of action comprising different elements.

B. West Virginia Recognizes an Actionable Claim for Negligent Repair and Petitioner's Complaint Categorically Satisfies Any and All Pleading Requirements Relative Thereto.

Under existing West Virginia law, petitioner has clearly pled all the requisite elements of an actionable claim for negligent repair. Skeen v. C & G Corp., 155 W. Va. 547, 185 S.E.2d 493 (1971); see also Hardman Trucking, Inc. v. Poling Trucking Co., 346 S.E.2d 551, 555 (W. Va. 1986) (holding that lost profits, if reasonably foreseeable, are recoverable under a negligence theory).

West Virginia law categorically holds that one who undertakes to repair is responsible to fully perform such repair, and the failure to do so constitutes

negligence. Skeen v. C & G Corp, supra. In Skeen, the plaintiff had purchased a mobile home from a retail dealer. After occupying the mobile home for three days, the plaintiff reported an inoperable water heater and several other electrical problems to the dealer, who promised to send a repairman to correct these faults. A few days later, the dealer's repairman inspected the mobile home and acknowledged the existence of certain electrical defects. Nonetheless, he told the plaintiff that the electric current could be left on, that the trailer was safe and that he would return the next day to complete the repairs. Before returning, the trailer and its contents were totally consumed by fire.

The plaintiff in Skeen sued both the manufacturer of the mobile home and the retail dealer based on theories of negligence and breach of implied warranties. 185 S.E.2d at 496. In addition, the plaintiff brought an

independent claim against the dealer for negligent repair. A jury returned verdicts against both defendants.

On appeal, the West Virginia Court of Appeals approved the giving of a jury instruction that permitted recovery for negligent repair if the following elements were shown:

> 1. the plaintiff called the defendant for repair service;
>
> 2. the defendant was aware of defective functioning in the relevant equipment;
>
> 3. the defendant thereafter did undertake the repair or correction of such defects if any; and
>
> 4. the defendant's negligent repair proximately caused the loss complained of.

Id. at 497. In affirming the jury's verdict against the dealer based upon the above instruction, the court stated:

> In the instant case we believe that Casto Trailer Sales, Inc., through its representative, in the circumstances

> revealed by the evidence, assumed the responsibility for the defects and thereby undertook to make the repairs. Upon assuming this responsibility its negligence became apparent by its omission to act and the subsequent damage that occurred.

Id. at 498. Moreover, the Court also held that liability for negligent repair could be premised upon slight evidence:

> We are of the opinion that the evidence, even though it may be slight, was sufficient to permit the jury to decide whether or not Casto's repairman did undertake to repair the defects in the trailer and whether or not he was negligent in such undertaking . . . .

Id. at 499.

The allegations of petitioner's complaint adhere faithfully to the jury instructions approved by the West Virginia Supreme Court of Appeals in Skeen. Kaiser has alleged that Westinghouse agreed to fully repair the subject rotor, that Westinghouse had a duty to exercise reasonable care in performing repairs, that

Westinghouse failed to exercise reasonable care in performing the repairs, and that Kaiser suffered damages as a result of the negligent repairs. (Complaint ¶¶ 12, 13, 14, and 18, Appendix D, Tab 2.)

Petitioner has adequately alleged a claim recognized under the laws of West Virginia applicable to this diversity action. The district court and the circuit court, in direct contradiction to this Court's holdings pertaining to Rule 12(b)(6) motions, have denied petitioner's right to pursue a claim clearly recognized as actionable under West Virginia law. Therefore, certiorari should be granted to reaffirm this Court's commitment to Conley and to uphold this Court's uniform application of the notice pleading requirements of the Federal Rules of Civil Procedure.

C. **The Fourth Circuit Failed to Apply Controlling State Law When it Affirmed the District Court's Grant of Respondent's Rule 12(b)(6) Motion.**

When reviewing a dismissal of an action under Fed. R. Civ. P. 12(b)(6), the circuit court is to conduct a de novo review of the dismissal. Faulkner Advertising Associations, Inc. v. Nissan Motor Corp., 905 F.2d 769 (4th Cir. 1990), aff'd on rehearing en banc, 945 F.2d 694 (4th Cir. 1991); Finlator v. Powers, 902 F.2d 1158 (4th Cir.1990); Revene v. Charles County Comrs., 882 F.2d 870 (4th Cir. 1989). Consequently, the Fourth Circuit was obliged to consider the entire record submitted to the district court and to apply the principles enunciated in Conley, supra, without deference to the district court's decision.

A federal court sitting in a diversity action is required to apply state law to all substantive legal issues affecting the controversy. Erie R. Co. v. Tompkins, 304 U.S. 64, 77-78 (1938). As previously discussed, this

controversy is controlled by the law of West Virginia, which categorically recognizes a cause of action for the negligent repair of a product. Furthermore, petitioner's complaint satisfies all of the elements of a negligent repair cause of action as enunciated by the West Virginia Supreme Court of Appeals in Skeen, supra.

Instead of conducting a de novo review and focusing on Skeen's application to petitioner's complaint, the Fourth Circuit opined that the district court "seems to have assumed that the action was one in strict liability in tort . . . ." (Decision, p. 4, Appendix A, Tab 3.) The circuit court endorsed such an assumption by agreeing with respondent's characterization that petitioner's complaint attempted to plead a cause of action in strict products liability. (Decision, p. 8, Appendix A, Tab 3.) In explaining its reasoning, the Fourth Circuit stated:

> The district judge did not, in his opinion, expressly determine that the action was

> in products liability. This, however, is implicit in his decision. He found the case controlled by Star Furniture, supra, a decision which was equivalent to a finding that the action was in strict liability in tort, and this conclusion seems correct.

See Decision, p. 8, Appendix A, Tab 3. (Emphasis added.)

In Star Furniture Co. v. Pulaski Furniture Co., 297 S.E.2d 854 (W. Va. 1982), the West Virginia Supreme Court of Appeals responded to a certified question the United States District Court for the Southern District of West Virginia dealing with the issue of whether strict products liability could be used to recover for property damage. In Star, the plaintiff alleged that defective wiring in a clock caused a fire which resulted in substantial property damage. The defendant argued that strict liability should be limited to recovery for damage to property other than the defective product and be further limited to exclude consequential damages

such as lost profits. Id. at 857. The court determined that "property damage" fell into three separate categories: damage to property other than the defective product, damage to the defective product, and loss of good will or profits. Id. The court also noted that product itself was often characterized as "economic loss." Id. In considering damage to the defective product itself, the court embarked upon a discussion of decisions from other jurisdictions. In its discussion, the court recognized that:

> The difficulty in determining whether to apply strict liability for any type of economic loss results from the tension between the tort doctrines of strict liability and contract theory embodied in the Uniform Commercial Code. "Contract law has been traditionally concerned with the fulfillment of reasonable economic expectations. Tort law, on the other hand, is concerned with the safety of products and the corresponding quantum of care required of a manufacturer."

Id. at 858. The court also observed that:

> A majority of courts which have considered the applicability of strict liability to recover damages to the defective product itself have permitted use of the doctrine, at least where the damage occurred as a result of a sudden violent event and not as the result of an inherent defect which reduced the property's value without inflicting physical harm to the product.

Id.

The court rejected the line of bad bargain cases begun by Santor v. A&M Karagheusian, Inc., 44 N.J. 52, 207 A.2d 305 (1965) (an action that involved prematurely worn carpet), permitting use of strict liability to recover the difference between the actual value of the product and its purchase price regardless of whether the decrease in value was caused by a sudden calamitous event. Instead, the court held "that in West Virginia, property damage to defective products which results from a sudden calamitous event is recoverable under a strict liability cause of action. Damages which

result merely because of a 'bad bargain' are outside the scope of strict liability." 297 S.E.2d at 859.

The court in Star also determined that a commercial enterprise may utilize strict liability actions to recover economic losses caused by property damage if the sudden calamitous criteria were met:

> As discussed above, recoverable damages do not include lost profits or the difference in value of the defective product and its purchase price absent a sudden destructive event.

Id. at 861. (Emphasis added.) The clear corollary to the holding recited above is that economic damages consisting of lost profits and the decreased value of the defective product are recoverable in West Virginia if such damages are caused by a sudden destructive event. Economic damages resulting from a bad bargain are not.

It should be noted that the analysis of the West Virginia Supreme Court of Appeals in Star regarding

damage to the defective product itself was limited to the context of a strict products liability action. Although the complaint apparently stated a claim for negligence, the certified question prompting the court's discussion of the dichotomy between tort and contract law dealt solely with strict liability. The decision in Star was silent regarding any application of the sudden calamitous event requirement to the plaintiff's negligence claim.

Four years later in Roxalana Hills, Ltd. v. Masonite Corp., 627 F. Supp. 1194 (S.D. W. Va. 1986), a diversity action involving a claim that the defendant's wall siding had prematurely deteriorated, Judge Haden used the Star Furniture analysis to determine that the damages sought by the complaint did not result from the type of sudden calamitous event that might present safety concerns. He therefore granted the defendant's motion to dismiss on the pleading. In explaining his decision, he stated:

> The safety of the product is not mentioned nor even suggested by this pleading. The character of the losses charged are decay and rotting -- the type Star Furniture explicitly held to be economic and, therefore, the subject of a bad bargain.

627 F. Supp. at 1198. (Emphasis added.) Moreover, in dismissing the claim that the wall siding had been negligently manufactured, Judge Haden also opined that: ". . . West Virginia would not find a negligence cause of action in a breach of contract case . . . . The Court concludes the same bargain and expectation interests apply to negligent breaches of contract." Id. at 1198.

The West Virginia Supreme Court of Appeals has never specifically addressed whether it would apply the sudden calamitous event criterion to the type of negligent repair cause of action recognized in Skeen, supra. In Hardman Trucking, supra, decided four years after Star Furniture, the West Virginia court upheld the

recovery of lost profits under a negligence theory without discussing a sudden calamitous event. Likewise, in Capitol Fuels, Inc. v. Clark Equipment Co., 382 S.E.2d 311 (W. Va. 1989), the West Virginia Supreme Court of Appeals reaffirmed its adherence to the sudden calamitous event criterion as enunciated in Star Furniture for the recovery of "property damage to defective products . . . under a strict liability cause of action," id. at 313, but failed to specifically address whether that criterion would also apply to a claim for negligent repair.[7]

In Capitol Fuels, a front end loader had caught fire and destroyed itself due to alleged defects in its design and manufacturer. On appeal, the defendants

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[7] It is noteworthy that the Uniform Commercial Code would not provide a remedy for the negligent repair of a product. The UCC provides remedies for the sale of goods, but not the provision of services.

asserted that the West Virginia Supreme Court of Appeals:

> [S]hould adopt the United States Supreme Court's holding in East River Steamship Corp. v. TransAmerica delaval, Inc., 476 U.S. 858, 871, 106 S. Ct. 2295, 2302, 90 L.Ed.2d 865, 877 (1986) that "a manufacturer in a commercial relationship has no duty under either a negligence or strict products liability theory to prevent a product from injuring itself."

382 S.E.2d at 312. (Emphasis added.) The West Virginia court acknowledged that in East River, this Court recognized that the states had evolved several different positions regarding a right to recovery for damage to the defective product itself, including the intermediate position adopted in Star Furniture involving the necessity for a sudden calamitous event. The West Virginia court noted that it had made a similar survey of the law at the time it decided Star Furniture but, that, with all deference to the United States Supreme Court, the East River decision did not persuade it that "tort

liability should not be extended to a manufacturer whose defective product creates a potentially dangerous situation to persons and property and results in the sudden destruction of the product itself." 382 S.E.2d at 313. In rejecting the adoption of East River in West Virginia, the court reasoned that:

> The front end loader was not merely an ineffective product which failed to meet the customer's expectations. A defect in the front end loader caused an abrupt fire which continued to burn until the loader was destroyed. The operator of the loader escaped without injury. The defect in the front-end loader created a potentially dangerous situation and the risk associated with the defect was not one ordinarily contemplated by a purchaser.

382 S.E.2d at 313. (Emphasis added.) Accordingly, the court held that:

> In order to recover under Star Furniture, the damage to the product must result from a sudden calamitous event attributable to the dangerous defect or design of the product itself.

Id.

In dismissing the petitioner's complaint here, the district court stated that economic losses are not recoverable under West Virginia law in strict liability actions, citing Star Furniture, and that:

> . . . [I]n order to maintain an action for strict liability in tort, 'the damage to the product must result from a sudden calamitous event attributable to the dangerous defect or design of the product itself.' Capitol Fuels, Inc. v. Clark Equipment Co., [citation omitted] (reaffirming Star Furniture).

See Memorandum Opinion and Order, pp. 2-3, Appendix A, Tab 1.

The district court's reference to "economic losses" clearly implies that the court misread petitioner's complaint as alleging the type of bad bargain claim that Star held must be pursued under contract law. Those cases all involved dissatisfaction with the premature deterioration of a product's effectiveness. Usually, the deterioration has progressed over a significant period of time. See e.g., Jones & Laughlin Steel Corp. v. Johns-

Manville Sales Corp., 626 F.2d 280 (3rd Cir. 1980); Roxalana, supra. Here, however, petitioner's complaint stated that "electrical failures occurred immediately in the spare rotor-shaft component" which "rendered the Kaiser . . . mill inoperable for approximately ten days." (Complaint ¶¶ 18 and 19, Appendix D, Tab 2.) Construing the allegations of the complaint favorably to petitioner as required in determining a Rule 12(b)(6) motion, Scheuer v. Rhodes, supra at 1686, an immediate electrical failure rendering petitioner's production plant inoperable for ten days is clearly both a sudden and a calamitous event.

Moreover, in imposing the additional pleading element of a "dangerous defect or design of the product itself" as set forth in the discussion of a strict products liability claim in Capitol Fuels, supra, the district court totally ignored the fact that petitioner's complaint was for negligent repair, not strict products liability. It is

obviously not incumbent upon a plaintiff pursuing a negligent repair claim to plead elements that are uniquely applicable to a strict liability cause of action. Nevertheless, the district court's decision mandated exactly such an anomalous result.[8]

Having determined in Roxalana, supra, that the West Virginia Supreme Court of Appeals would apply the sudden calamitous event criterion to property damage caused by a negligently manufactured product, it is perhaps not surprising that Judge Haden would reach the same result regarding property damage caused by a negligently repaired product. However, that result would in no way support the district court's conclusion

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[8] The inequitable effect upon petitioner of the judgment of dismissal was sharpened by the fact that it was issued five days before trial after the completion of extensive discovery, yet afforded no leave to file an amended complaint.

that other factors in Star and Capitol Fuels uniquely applicable to strict liability claims should also become requisite elements for purposes of pleading a negligent repair claim. In other words, it may have been within the district court's discretion to opine that petitioner would have to show that the rotor failure was a sudden calamitous event in order to recover for negligent repair. However, it was totally unreasonable for Judge Haden to require petitioner to satisfy all of the pleading elements that Star might impose for a strict liability claim. Moreover, if the district court had any doubt that petitioner was, in fact, alleging that its property damage was caused by a sudden calamitous event, the photos of the electrically damaged rotor[9] and the deposition

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[9] The color photograph of the electrically damaged rotor were submitted to the district court with petitioner's initial response to the motion to dismiss.

testimony of Duane Alderman[10] should have erased any such doubts.

Although the complaint alleged that the electrical failure was immediate and placed petitioner's mill out of operation for approximately ten days, the Alderman deposition testimony graphically demonstrated that the escape of 13,000 volts of electricity from the negligently repaired rotor was a sudden event that not only caused components of the rotor to be "completely disintegrated" and "destroyed" (Alderman Dep. Tr., pp. 173-74, Appendix D, Tab 5), but was potentially threatening to the personal safety of Mr. Alderman and his brother. (Alderman Dep. Tr., p. 161, Appendix D, Tab 5.) See also Capitol Fuels, supra at 313 ("[t]he

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[10] The Alderman deposition testimony was submitted to the district court with petitioner's motion to amend findings and judgment pursuant to Rules 52(b) and 59(e).

operator of the loader escaped without injury. The defect in the front-end loader created a potentially dangerous situation and the risk associated with the defect was not one ordinarily contemplated by a purchaser"). The escaping voltage was certainly not the type of progressive, premature deterioration characteristic of bad bargain cases such as Santor and Roxalana. Nevertheless, the district court denied petitioner's motion for amended findings and judgment without any explanation or discussion whatsoever.

Had the Fourth Circuit exercised its responsibility to conduct a de novo review of the district court's decision, it would have been compelled to reverse and order this case to proceed to trial. Instead, the Fourth Circuit compounded the overly broad interpretation which the district court gave to Star by acquiescing in respondent's characterization of the complaint as stating a cause of action in strict product liability. (Decision,

p. 9, Appendix A, Tab 3.) Without citing Conley, supra, or any of its progeny, and without discussing Rule 8, the circuit court limited its review to the issue of whether the district court's characterization of the complaint as a strict liability claim was defensible. In so doing, the Fourth Circuit so far departed from the holdings of this Court and those of the West Virginia Supreme Court of Appeals as to compel this Court's power of supervision.

The Fourth Circuit prefaced its analysis by stating:

> In his opinion granting the motion, the district judge seems to have assumed that the action was one in strict liability in tort as established under the law of West Virginia, ...

See Decision, pp. 4-5, Appendix A, Tab 3. (Emphasis added.) After acknowledging petitioner's assertion, both in brief and at oral argument, that "its action is not 'a product liability claim based on the manufacture and

sale of a defective product,'" but rather "'based solely on . . . the conduct of Westinghouse in repairing the spare rotor component,'" the circuit court stated that respondent "on the other hand, takes the position that this action was by its very nature a products liability action." The circuit court then observed:

> Such were the conflicting positions of the parties on the nature of the action herein. The district judge did not, in his opinion, expressly determine that the action was in products liability. This, however, is implicit in his decision. He found the case controlled by Star Furniture, supra, a decision which was equivalent to a finding that the action was in strict liability in tort, and this conclusion seems correct.

See Decision, p. 8, Appendix A, Tab 3. (Emphasis added). Having thus totally misperceived the nature of its review, the circuit court's decision then digressed into a long discourse on the development of the law of strict liability both nationally and in West Virginia. (Decision, pp. 11-17, Appendix A, Tab 3.) This

discussion included the circuit court's endorsement of this Court's decision in East River, supra, rejecting the "sudden calamitous event" line of cases represented by Star Furniture. (Decision, p. 16, Appendix A, Tab 3.) The circuit court noted that subsequent to East River, many state courts had adopted its holding denying a tort recovery for property losses arising from a commercial dispute. This shift included some states that had previously allowed a tort recovery for sudden calamitous events, but the Fourth Circuit noted that, despite East River, the West Virginia court had reaffirmed Star Furniture in Capitol Fuels. (Decision, p. 16, Appendix A, Tab 3.)

In the de novo review required of the circuit court in this Rule 12(b)(6) dismissal, it was incumbent upon the Fourth Circuit to apply the substantive law of the State of West Virginia to the allegations of the complaint and the additional evidence submitted by

petitioner regardless of whether the circuit court held a different view of what the law of West Virginia ought to be. Erie v. Tompkins, supra. For purposes of this motion, the applicable substantive law of West Virginia is that set forth in Skeen, not East River.

The circuit court's attempt to distinguish the facts here from those in Skeen was both misguided and misplaced. Instead of focusing on the negligent repair claim against the mobile home dealer, the circuit court held that Skeen was inapplicable because petitioner's claims were analogous only to Mr. Skeen's breach of warranty claim against the mobile home manufacturer. (Decision, p. 10, Appendix A, Tab 3.) The circuit court's reasoning implies an intent to blind itself to the West Virginia Supreme Court of Appeals clearly enunciated recognition of a cause of action based on negligent repair.

The entire discussion in Skeen regarding negligent repair applies exclusively to the plaintiff's claim against the dealer whose agent failed to repair the electrical defects in the mobile home after the sale. 185 S.E.2d at 496. The discrete claims against the manufacturer of the mobile home for breach of warranty were based upon defects introduced during the manufacturing process and are completely irrelevant to petitioner's claim for relief based on negligent repair. Here, Westinghouse was both the manufacturer and the seller of the subject rotor. However, as with the dealer who sold the mobile home in Skeen, Westinghouse separately undertook to perform repairs when the rotor was damaged after the sale. The fact that Westinghouse was also the manufacturer of the spare rotor is a mere fortuity with regard to its separate duties as a repairman. Petitioner has never asserted any claims

against Westinghouse based on its conduct as manufacturer or seller.

In Skeen, the plaintiff was also able to sue the manufacturer because the electrical problems which the dealer undertook to repair allegedly existed at the time the mobile home left the control of the manufacturer. The claims against the manufacturer, however, were totally distinct from the negligent repair claims against the dealer. Here, the electrical faults which caused petitioner's damages were not present when the rotor left the control of Westinghouse during the manufacturing process.[11] Consequently, petitioner

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[11] When it was first placed in operation, the electrical windings of the spare rotor operated without any problem for at least a day. (Complaint ¶ 11, Appendix D, Tab 2.) On the second day of operation, a mechanical problem caused the rotor to slip horizontally (continued...)

intentionally eschewed bringing a strict liability claim against respondent in its role as manufacturer (Decision, p. 7, Appendix A, Tab 3) because it recognized that it could never establish that the damage causing electrical fault, existed in the rotor at the time it left the control of Westinghouse after the manufacturing process. Petitioner's complaint clearly alleges, however, that the

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[11](...continued)
on its shaft and its electrical windings contacted the metal casing that housed the rotor. (Complaint ¶ 18, Appendix D, Tab 2.) It was due to that contact with the metal housing or during the subsequent repairs by respondent that electrical damage to the rotor occurred. The claim against respondent is based upon its failure during the repair process to conduct the diagnostic tests necessary to identify the existence of the electrical faults that were caused by the contact with the metal housing or by mishandling during the repair process.

condition which caused Kaiser's damages existed when the rotor left the control of Westinghouse as repairman. (Complaint ¶¶ 14-18, Appendix D, Tab 2.).

The Fourth Circuit also seriously misconceived and misapplied the purposes for which petitioner filed deposition testimony with the district court. At no time, did petitioner offer deposition evidence in support of a strict products liability claim. The deposition testimony of Duane Alderman was submitted to demonstrate that the occurrence giving rise to petitioner's claim was indeed sudden and calamitous and to dispel any possible contention to the contrary. (Plaintiff's Memorandum in Support of Rule 52(b) and 59(e) Motions, Appendix D, Tab 1.) By offering the Alderman testimony, petitioner also sought to preempt any subsequent motion for summary judgment challenging the sufficiency of plaintiff's proof regarding the existence of a sudden calamitous event.

The Fourth Circuit's misconception that petitioner raised the issue of a sudden and calamitous event as a means of asserting a strict liability claim (Decision, p. 14, n.7, Appendix A, Tab 3) is indicative of the extent to which the circuit court erroneously endorsed respondent's mischaracterization of petitioner's cause of action. Respondent submitted no deposition testimony to the district court from any eyewitness to the voltage escape occurrence disputing the Alderman testimony. Consequently, Mr. Alderman's testimony regarding the physical danger to which he and his brother were exposed and the complete disintegration of components of the rotor must be accepted as true. As such, the occurrence is squarely analogous to the circumstances which the West Virginia court determined to be a sudden calamitous event in Capitol Fuels. Instead, the circuit court held that "it certainly cannot be argued that what occurred to the rotor on December 3, 1987 was

a 'sudden calamitous event.'" (Decision, p. 10, Appendix A, Tab 3.) In an attempt to justify this reasoning, the Fourth Circuit ignored the portions of the Alderman deposition transcript cited by petitioner and then selectively miscited other portions of the Alderman deposition testimony which had no relevance whatsoever to the testimony he gave regarding the escape of electrical voltage, his fears for his personal safety and that of his brother, and the physical destruction caused to the rotor. Moreover, the entire discussion by the circuit court of the Alderman deposition testimony was framed in the context of whether petitioner could prove a strict liability claim. (Decision, pp. 17-20, Appendix A, Tab 3.)

The actions of the circuit court in ignoring the provisions of Fed. R. Civ. P. 8, in ignoring the standard of review established by Conley, supra, and in ignoring the decision of the West Virginia Supreme Court of

Appeals in Skeen have cumulatively undermined the notice pleading tenets of the Federal Rules and the primacy of this Court. No federal court sitting in a diversity action should be free to ignore the plain allegations of a complaint stating an actionable claim under state law and to arbitrarily substitute a distinctly different cause of action comprising other legal elements. Otherwise, federal courts could utilize Rule 12(b)(6) as a docket control device to dismiss complaints by allowing the defendant to mischaracterize the plaintiff's cause of action. For these reasons, the decision of the Fourth Circuit should be reversed and petitioner's action should proceed to trial.

D. **The Fourth Circuit Effectively Denied Petitioner Access to Court in Violation of the First Amendment to the United States Constitution When It Affirmed the District Court's Grant of Respondent's Rule 12(b)(6) Motion.**

The First Amendment to the United States Constitution states the following in pertinent part:

> Congress shall make no law . . . abridging . . . the right . . . to petition the government for a redress of grievances.

The Court has held that one aspect of the right to petition is the right of access to the courts. California Motor Transport Co. v. Trucking Unlimited, 92 S.Ct. 609, 612 (1972). ("[c]ertainly the right to petition extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right of petition"); See also Ryland v. Shapiro, 708 F.2d 967, 972 (5th Cir. 1983) ("[t]he right of access to the courts is basic to our system of government, and it is well established today that it is one of the fundamental rights protected by the Constitution");

American Civil Liberties Union, Inc. v. Mabus, 719 F.Supp. 1345, 1358 (S.D.Miss. 1989) ("[t]he right to bring a claim before a court of law is fundamental and is protected by the United States Constitution whether the claim arises under state or federal law. The right is grounded in the First Amendment right to petition the government for redress, . . ."); Stump v. Gates, 777 F.Supp. 808, 817 (D. Colo. 1991) ("[t]he right of access to the courts is basic to our system of government, and is well recognized as one of the fundamental rights protected by the Constitution. As early as 1885, the United States Supreme Court declared that all persons: 'should have like access to the courts of the country for the protection of their persons and property, [and] the prevention and redress of wrongs . . ..' Barbier v. Connolly, 113 U.S. 27, 5 S.Ct. 357, 28 L.Ed. 923 (1885)"); Chrissy F. v. Mississippi Dept. of Public Welfare, 780 F. Supp. 1104, 1119 (S.D.Miss. 1991)

("[t]he right to present a claim before a court of law is basic to our system of government and is, consequently, one of the most fundamental rights protected by the United States Constitution").

Moreover, the right of access to the courts applies to the bringing of general civil cases as well as constitutional claims, Mullane v. Central Hanover Bank & Trust, Co., 70 S.Ct. 652 (1950), and to diversity tort actions, Chambers v. Baltimore & O.R., 28 S. Ct. 34 (1907). In discussing the right of access in McCray v. Maryland, 456 F.2d 1 (4th Cir. 1972), the court, after observing that access to courts is protected by the First Amendment, stated:

> Of what avail is it to the individual to arm him with a panoply of constitutional rights if, when he seeks to vindicate them, the courtroom door can be hermetically sealed against him by a functionary who by refusal or neglect, impedes the filing of his papers?

Id. at 6.

Most of the cases cited above discuss the constitutional right of access to court in the context of some state action that foreclosed a litigant's use of the courts. However, the reasoning underlying these First Amendment decisions applies with equal force to the actions of a federal circuit court that ignores the plain allegations of a complaint stating a cause of action for negligent repair and arbitrarily construes the complaint as stating a cause of action in strict products liability when a strict liability claim cannot possibly lie under the factual circumstances of the case. By imposing such a result, the Fourth Circuit has left the courtroom door just as hermetically sealed to petitioner as was the door in McCray, supra.

Unless litigants in the federal courts can rely on the principle that they alone are empowered to determine the type of cause of action that provides them with the best opportunity for redress of

grievances, the possibility exists for serious abuse of the judicial process. No court should constructively deny access to the courtroom door by converting a litigant's claims into a cause of action untenable in the circumstances. In order to ensure continued public confidence in the ability of the federal courts to fairly read the well-pleaded allegations of a complaint and to faithfully apply state law to substantive issues in diversity matters as required by Erie, this Court must not condone the Fourth Circuit's unwillingness to allow this negligent repair dispute to be determined on the merits.

CONCLUSION

The circuit court has so far departed from the holdings of this Court and the West Virginia Supreme Court of Appeals as to call for this Court's supervision. Consequently, petitioner respectfully requests the Court to grant a writ of certiorari to reverse the Order and Judgment of Dismissal affirmed by the Fourth Circuit

Court of Appeals on December 2, 1992, and to order this case to proceed to trial.

Dated this 26th day of February, 1993.

Respectfully submitted,

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A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

PARKERSBURG DIVISION

KAISER ALUMINUM &
CHEMICAL CORPORATION,

Plaintiff,

CIVIL ACTION NO. A:88-1512

vs.

WESTINGHOUSE ELECTRIC
CORPORATION,

Defendant.

MEMORANDUM OPINION AND ORDER

Pending before the Court is the Defendant's motion to dismiss. The issues raised therein have been fully briefed. The facts of this case are taken from the complaint and, for purposes of this motion, are accepted as true.

The Plaintiff operated an industrial plant at Ravenswood, West Virginia. The facilities at the plant included a 168-inch hot mill for aluminum. The mill was powered through a motor-generator set, which included

a stator component and a rotor/shaft component. In 1976 the Plaintiff Kaiser Aluminum & Chemical Corporation ordered from the Defendant Westinghouse Electric Corporation one of each of these components to have on hand in the event of failure of those then in use. These parts were delivered in 1978 or 1979, but were not used until April, 1981, when they were installed in the motor-generator set. After installation the rotor/shaft component malfunctioned and Westinghouse agreed to repair it. Following the repair, the component was again stored until it was needed in December, 1987. After the second installation and upon Kaiser's attempt to start up the motor-generator set, the rotor/shaft component failed immediately, causing damage to the motor-generator set. As a result, the hot mill was out of service for about ten days.

The Plaintiff seeks damages representing the costs of repair to the motor-generator set and business interruption losses. The Plaintiff bases its claim on the

alleged negligent repair of the rotor/shaft component by the Defendant.

In its motion to dismiss, the Defendant contends that the damages sought by the Plaintiff represent economic losses and, as such, are not recoverable in tort. The Defendant's contention is based on its position that the damages sought are the result of the rotor/shaft component's failure to meet the Plaintiff's expectations for performance and are recoverable, therefore, only under a breach of contract or breach of warranty theory. As a contract action, the Defendant further contends, recovery is barred by the applicable statute of limitations.

Under West Virginia law, "commercial enterprises may utilize strict liability actions to recover damages" but with certain critical limitations. Star Furniture Co. v. Pulaski Furniture Co., ___ W.Va. ___, 297 S.E.2d 854, 861 (1982). Damages for economic losses are not recoverable in such an action. Id. at 859. Moreover, in

order to maintain an action for strict liability in tort, "the damage to the product must result from a sudden calamitous event attributable to the dangerous defect or design of the product itself." Capitol Fuels, Inc. v. Clark Equipment Co., ___ W.Va. ___, 382 S.E.2d 311, 313 (1989) (reaffirming Star Furniture).

Perhaps recognizing that it can recover, if at all, in tort only under the principles set forth in Star Furniture, Kaiser's position is stated as follows. As a result of Westinghouse's negligent repair, the rotor/shaft component "suffered a sudden, immediate and massive electrical failure" when energized which resulted in physical damage to the rotor itself and the motor-generator set and in loss of profits during the period of time the hot mill was not operational,[1] Plaintiff's

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[1] The relevant allegations in the complaint are as follows:

(continued...)

memorandum at 4. The Plaintiff has not alleged, however, that the electrical failure was attributable to

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[1](...continued)

"17. On December 3, 1987, plaintiff Kaiser Aluminum attempted to energize and start the 168 inch mill motor-generator set, which included the spare rotor-shaft component.

18. As a direct and proximate result of the negligent repairs made by defendant Westinghouse, as described in Paragraph No. 14 above, electrical failure occurred immediately in the spare rotor-shaft component.

19. This failure of the spare rotor-shaft component caused physical damage to the motor-generator set, and rendered the Kaiser Aluminum 168 inch mill inoperable for approximately 10 days."

any inherently dangerous defect or design of the rotor/shaft component.

In paragraph 8 of the complaint, Kaiser has alleged that extra parts "were purchased as backup or spare components to be used in the event of a failure of the existing motor generator components . . . ." Thus, it is clear that the failure of the rotor was not a sudden calamitous event, but rather was an event contemplated by Kaiser at the time it purchased the rotor/shaft component.

Having failed to satisfy either element of a Star Furniture type of claim, the allegations of the complaint will not support a tort cause of action. Instead, the Plaintiff's factual allegations support only an action for damages resulting from the ineffectiveness of the rotor/shaft component. Such damages are economic losses and may be pursued only in a contract or breach

of warranty action[2]. See Roxalana Hills Ltd. v. Masonite Corp., 627 F.Supp. 1194 (S.D. W.Va. 1986), aff'd. 813 F.2d 1228 (4th Cir. 1987).

In its answer and motion to dismiss, Westinghouse has raised a statute of limitations defense. The relevant statute of limitations is set forth at W.Va. Code, §46-2-725, which provides in pertinent part:

> "(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.
>
> (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a

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[2] The Court is not troubled by the Plaintiff's allegations regarding damage to property other than the rotor itself. See Roxalana Hills, 627 F.Supp. at 1197.

> warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.
>
> * * *

This action, begun November 17, 1988, was not brought within four years after tender of delivery of the rotor/shaft component -- whether that time is fixed in 1979 when it was first delivered or in 1981 when it was returned after repair. There is no allegation that the rotor was warranted as to future performance so as to toll the statute of limitations as permitted by Section 46-2-725(2). Nor does the Plaintiff's discovery of the breach after the expiration of a four-year period operate to toll the statute of limitations. Because of the express language of subsection 2, the West Virginia Supreme Court of Appeals has declined to recognize the discovery rule in a case governed by that provision.

> "[W]here the only loss suffered is an economic loss, as in the case of losses which are associated with a 'bad bargain,'

> the injured party must pursue the remedies provided in the Uniform Commercial Code, subject to the statute of limitations contained therein."

Basham, 377 S.E.2d at 835. Any breach of warranty incident to the sale of the component, therefore, became actionable at the time of delivery.

For the foregoing reasons, this action is dismissed for failure to state a claim upon which relief can be granted. Alternatively, the action is dismissed inasmuch as recovery is precluded by the applicable statue of limitations.

The Clerk is directed to send a certified copy of this Memorandum Opinion and Order to counsel of record.

ENTER: October 12, 1989

Charles H. Haden II, Chief Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

PARKERSBURG DIVISION

KAISER ALUMINUM &
CHEMICAL CORPORATION,

Plaintiff,

CIVIL ACTION NO. A:88-1512

vs.

WESTINGHOUSE ELECTRIC
CORPORATION,

Defendant.

JUDGMENT ORDER

In accordance with the Memorandum Opinion and Order entered this day, the Court hereby ORDERS as follows:

1. That the motion of the Defendant Westinghouse Electric Corporation to dismiss is granted; and

2. That the Plaintiff take nothing, that the action be dismissed on the merits, and that the Defendant recover of the Plaintiff its costs of action.

The Clerk is directed to remove this action from the docket of this Court and to send a certified copy of this Judgment Order to counsel of record.

ENTER: October 12, 1989

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Charles H. Haden II, Chief Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

PARKERSBURG DIVISION

KAISER ALUMINUM &
CHEMICAL CORPORATION,

Plaintiff,

CIVIL ACTION NO. A:88-1512

vs.

WESTINGHOUSE ELECTRIC
CORPORATION,

Defendant.

ORDER

Pending before the Court is Plaintiff's motion to amend the Memorandum Opinion and Order and to vacate the Judgment Order entered October 12, 1989, pursuant to Rules 52(b)9 and 59(e), Federal Rules of Civil Procedure. Plaintiff filed this motion on October 25, 1989. After having carefully considered this matter, Plaintiff's motion is denied.

The Clerk is directed to send a copy of this Order to counsel of record.

ENTER: September 10, 1990

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Charles H. Haden II, Chief Judge

EDITOR'S NOTE

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PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

KAISER ALUMINUM AND CHEMICAL CORPORATION, A Delaware Corporation,

Plaintiff-Appellant,

v.

WESTINGHOUSE ELECTRIC CORPORATION, A Pennsylvania Corporation,

Defendant-Appellee.

No. 90-2189

Appeal from the United States District Court
for the Southern District of West Virginia, at Parkersburg.
Charles H. Haden II, Chief District Judge.
(CA-88-1512-A)

Argued: March 4, 1991

Decided: December 2, 1992

Before RUSSELL, Circuit Judge, and HILL, Senior Circuit Judge of the United States Court of Appeals for the Eleventh Circuit, sitting by designation, and WARD, Senior United States District Judge for the Middle District of North Carolina, sitting by designation.

Affirmed by published opinion. Judge Russell wrote the opinion, in which Senior Judge Hill and Senior Judge Ward joined.

COUNSEL

ARGUED: Richard Lawrence Gill, ROBINS, KAPLAN, MILLER & CIRESI, Minneapolis, Minnesota, for Appellant. Shawn Patrick

George, JACKSON & KELLY, Charleston, West Virginia, for Appellee. **ON BRIEF:** William M. Lutz, ROBINS, KAPLAN, MILLER & CIRESI, Minneapolis, Minnesota; Thomas V. Flaherty, KAY, CASTO, CHANEY, LOVE & WISE, Charleston, West Virginia, for Appellant. Anthony J. Majestro, Robert L. Elkins, JACKSON & KELLY, Charleston, West Virginia, for Appellee.

OPINION

RUSSELL, Circuit Judge:

This is a suit between a customer (Kaiser) who had purchased from a manufacturer (Westinghouse) a component of its electric generator which supplied power for the operation of its aluminum fabricating plant at Ravenswood, West Virginia. The manufactured article was to be used as a spare, available in event of any problem affecting the currently operating generator. When first put into service, the component showed evidences of slippage in the shaft on the second day of operation. The component was returned to Westinghouse for correction of the malfunction. The manufacturer returned the component a few weeks later after repairing the problem. Six or seven years later, the component was placed again in service but experienced electrical failures. As a result of such failures, the customer sustained (1) damages to the component itself and (2) a loss of profits by reason of the plant shut-down of approximately ten days, forced by the "electric failure." The customer sued to recover such losses, contending its suit was one in negligence arising out of the repair of the component. The manufacturer took the position that the action was in effect one in products liability where the redress is by strict-liability-in-tort action, a form of action uniquely developed for the manufacturer- vendor and customer-vendor situation. The district court implicitly found the suit to be in products liability, governed by the rules in the strict-liability-in-tort action, and we agree. Treated as such an action, the district court granted the motion of the manufacturer to dismiss the action under Rule 12(b)(6). It found that the recovery of "lost profits" in a strict-liability-in-tort action is impermissible; "lost profits" are only recoverable in an action in contract under the controlling law of West Virginia. Its second claim for damages to the component itself is

recoverable only if such damages are the result of a "sudden, calamitous event" caused by a defective product. There is no proof of such "sudden calamitous event" to which the damages were attributable. We accordingly affirm the dismissal action.

I.

The plaintiff, Kaiser Aluminum and Chemical Corp. (Kaiser), operates an aluminum fabricating plant at Ravenswood, West Virginia. The plant's operation is powered by an electric "motor generator" set. Essential components of such generator are a "motor-generator stator" and a "motor-generator rotor-shaft" (hereinafter referred to collectively as "rotor"). In order to avoid a plant shut-down in the case of a breakdown of the presently operating rotor, Kaiser determined to acquire a spare rotor. Such spare component was purchased in 1976 by Kaiser from the defendant, Westinghouse Electric Corp. (Westinghouse). It was not a readily available "shelf item," but was an item to be manufactured per specifications. The manufacture of the rotor was completed and the rotor delivered to Kaiser at its plant in Ravenswood in February, 1979. Kaiser did not immediately put the rotor in service; instead, it placed the rotor in storage until April 26, 1981, when such component was substituted for the original rotor "after a breakdown of the existing stator and rotor/shaft that had been in place." The next day, Kaiser alleged that the rotor "malfunctioned, in that the rotor was observed to have slipped horizontally on the shaft," and that such slipping had "caused damage to the rotor because the rotor came into contact with metal casing surrounding the rotor on the north side." Kaiser referred in its statement of facts in its complaint to no other problem during the use of the spare component on April 26 and April 27, 1981. Kaiser immediately complained to Westinghouse as the manufacturer from whom it had purchased the rotor. After receiving back the rotor, Westinghouse proceeded to make some corrections and adjustments to the rotor, and returned it to Kaiser in early May, 1981. Kaiser again put the rotor in storage until the existing motor generator "... suffered a breakdown in December 1989,"[1] when Kaiser substituted the spare rotor for the previously operated rotor.

[1]The factual statements in quotations are taken from the complaint, which the district judge accepted as true for purposes of deciding the motion to dismiss.

The complaint states that when Kaiser proceeded on December 3, 1989, "to energize and start" the generator with its "spare rotor shaft component," "electrical failures occurred immediately in the spare rotor-shaft component," resulting in "physical damage to the motor-generator set, and rendering [the mill] . . . inoperable for approximately 10 days." Kaiser alleged that such "electrical failure" was proximately due to the negligence of Westinghouse in "failing to properly and fully investigate the circumstances of the malfunctioning [in April, 1981]," in failing to "properly and fully examine and test the spare rotor/shaft assembly to determine the full nature and extent of the function" and to "fully and properly examine and test the spare rotor/shaft component after completing its repairs." Kaiser sought damages in the district court in the amount of $1,000,000. These damages encompassed two items—one, costs of repairing the rotor, and, two, lost profits due to a ten-day shutdown of the plant.

To Kaiser's suit Westinghouse filed an answer denying the principal allegations of negligence on its part. In particular, it denied that the stator or rotor/shaft caused the problems or was responsible for the "malfunctioning" alleged to have occurred on April 27, 1981. It stated in its answer, also, a number of affirmative defenses including an allegation that the action for lost profits was controlled by "the provisions of the Uniform Commercial Code, as enacted in the Code of West Virginia in Chapter 42-2-101 *et seq.*," and, as such, was "barred by the applicable statute of limitation." Almost simultaneously, Westinghouse filed, under Rule 12(b)(6), Fed. R. Civ. Proc., its motion to dismiss the complaint "for failure to state a claim on which relief [could] be granted." The motion to dismiss was extensively briefed by the parties. The motion itself was heard by the district judge on the facts set forth in the complaint, which, for purposes of the motion, the court accepted as true, and on the arguments, oral and in the briefs of the parties. The district judge granted the motion to dismiss, recording his reasoning for such dismissal in his Opinion and Judgment. *Kaiser Aluminum & Chem. Corp. v. Westinghouse Elec. Corp.*, No. 88-1512 (S.D.W. Va. Oct. 12, 1989).

II.

In his opinion granting the motion, the district judge seems to have assumed that the action was one in strict liability in tort as established

under the law of West Virginia, which, under *Erie R. Co. v. Tompkins*, 304 U.S. 64, 77-78 (1938), and *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941), is controlling here. Earlier, in *Morningstar v. Black & Decker Mfg. Co.*, 253 S.E.2d 666, 676 (W. Va. 1979), West Virginia had adopted as a part of its common law the doctrine of strict liability in tort substantially as stated in Section 402A of *Restatement (Second) Torts*. Based on this adoption, the district judge began his decision on the issues in the case with the declaration that, first, Kaiser's claim for lost profits represented damages for "economic losses" and, as such, were "not recoverable in such an action." *See Star Furniture Co. v. Pulaski Furniture Co.*, 297 S.E.2d 854, 859-60 (W. Va. 1982).[2] The district judge added, secondly, that "the damage *to the product* [which was Kaiser's second claim] must result from a sudden calamitous event attributable to the dangerous defect or design of the product itself." *See Capitol Fuels, Inc. v. Clark Equip. Co.*, 382 S.E.2d 311, 313 (W. Va. 1989) (emphasis added). In that connection, he assumed that there were two facts to be established in proving a strict liability action for damage to the product itself: (1) the product must have had a "'dangerous defect,'" and (2) the injury for which recovery was sought had to result from "a sudden calamitous event attributable to the 'dangerous defect.'" The district judge sought to apply those standards to the allegations of Kaiser's complaint in connection with its claim for damages to the product itself. He found that "Kaiser did not allege that the electrical failure [in 1987, which is the occasion for its claim] was attributable to any inherently dangerous defect or design of the rotor/shaft component," nor was the failure "the result of a sudden calamitous event." The absence of any such allegations, he concluded, required the dismissal of the claim. He accordingly entered an order of dismissal under Westinghouse's Rule 12(b)(6) motion to dismiss.

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[2]"Economic loss[es]" are "damages for inadequate value, costs of repair and replacement of the defective product or consequent loss of profits without any claim of personal injury or damage to other property. . . . The line of demarcation between physical harm and economic loss . . . reflects the line of demarcation between tort theory and contract theory." *Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp.*, 626 F.2d 280, 284-5 (3d Cir. 1980) (citation omitted).

III.

After the filing of the district judge's order dismissing the complaint with judgment in favor of Westinghouse, Kaiser filed a motion to vacate the order of judgment under Fed. R. Civ. Proc. 52(a) and 59(5). Along with its memorandum in support of its motion to vacate, Kaiser attached excerpts from certain discovery depositions taken at its instance largely in the period between the filing of the Rule 12 motion and the decision of such motion. The inclusion of these excerpts apparently was for the primary purpose of answering the grounds on which the district judge relied in his order of dismissal of the strict-liability-in-tort action. Their very inclusion is in a way a concession by Kaiser that its suit was in strict liability in tort. Thus, three of the depositions were from expert witnesses who sought to establish that, in their opinion, the rotor had "a dangerous defect." They identified the defect as the result of "a phase-to-phase fault in a part of the rotor windings or coils," which, uncorrected, caused the "failure" in 1979. The deposition of Duane Alderman, who, along with his brother, on the other hand, were the only witnesses to the accident in 1979, was manifestly intended to establish that the "failure" resulted from "a sudden calamitous event." All these circumstances had relevancy almost entirely to a products liability claim; indeed, this very expression includes unique strict liability terms.

These depositions, it must be emphasized, had been taken before the district judge filed his decision, but had not been presented to or made available to the district judge at or before the hearing, though Kaiser had access to the depositions for some time before the decision. It is well established that affidavits and exhibits not before the court in making its decision are not to be considered on appeal. *Gilson v. Republic of Ireland*, 787 F.2d 655, 659 (D.C. Cir. 1986); *United States v. Drefke*, 707 F.2d 978, 983 (8th Cir.), *cert. denied*, 464 U.S. 942 (1983); *Munoz v. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators*, 563 F.2d 205, 209 (5th Cir. 1977). It should be emphasized that all that the district judge had before him at the time as a summary of the facts on which to base his decision were included in the complaint. And the district judge made this plain at the outset of his opinion.

The district judge denied the motion to vacate. Though he filed a formal opinion of denial, such opinion included no explanation of the

reasons for his denial. Counsel for Westinghouse suggests that the district judge may have dismissed the motion because of Kaiser's failure to present to the district court earlier the evidence which it had had access to for some time before the decision. Perhaps a stronger reason, again not expressly stated by the district judge, was the effect that accepting this "new" evidence would have had on the proceedings. Had the evidence been accepted by the district judge, it would have immediately converted the proceedings from one under Rule 12 to one under Rule 56, Fed. R. Civ. Proc., and would have required reopening the entire proceedings, and all because of the inaction of Kaiser. Rule 12(c) provides that "[i]f, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion [should] be treated as one for summary judgment and disposed of as provided in Rule 56." Despite these difficulties, we might be hesitant to sustain a denial of a motion to vacate without any expressed reasoning for the court's decision, if the additional evidence, though filed untimely, indicated that the decision under review, if upheld, would result in a miscarriage of justice. But, this is not a case warranting such leniency. As we later point out, the additional evidence, in our judgment, would not warrant a result different than that represented in the district court's original decision. We, therefore, do not disturb the district judge's dismissal of the motion to vacate, and turn to another issue prior to examining the merits of the case itself.

IV.

The initial target of Kaiser's appeal, as stated in its brief and pressed in oral argument, is that the district court mistook the nature of its claim. Kaiser asserts, both in its brief and in its oral argument in this court, that its action is not "a products liability claim based on the manufacture and sale of a defective product." It characterizes its suit as one "based solely on the theory of negligent repair—that is, the conduct of Westinghouse in repairing the spare rotor component." It instances its studied failure in its complaint to use the strict liability terms of art—"design defect" and "inherently dangerous"—as support for this conclusion. Finally, it cites *Skeen v. C & G Corp.*, 185 S.E.2d 493 (W. Va. 1971), and *Elsey Ford Sales, Inc. v. Solomon*, 280 S.E.2d 718 (W. Va. 1981), as clear precedents for its position that its com-

plaint very plainly stated a suit for negligent repairs and for nothing else.

Westinghouse, on the other hand, takes the position that this action was by its very nature a products liability action. It declares that this was the position of Kaiser in the district court. It points to the language in the district court's order of dismissal to the effect that Kaiser in the hearings in the district court "recognized[ed] that it [could] recover only under the principles set forth in *Star Furniture* [*Star Furniture Co. v. Pulaski Furniture Co.*, 297 S.E.2d 854 (W. Va. 1982)]." *Star Furniture*, it observed, was a case which dealt exclusively with "the doctrine of strict liability [in tort]." *Star Furniture*, 297 S.E.2d at 856. Westinghouse also emphasizes that the "new" evidence which Kaiser sought to present, through its motion to vacate, was wholly directed at establishing a cause of action under the principles stated in *Star Furniture*. In this additional testimony, for instance, were three depositions from what were apparently expert witnesses. All their testimony was directed at establishing that the rotor was "defective" when Kaiser first sought to use it in 1981. The "defect" was identified by the experts to have been a "phase-to-phase" fault "on the rotor windings." It was a defect, in the opinion of these experts, which was easily discoverable and correctable by a "surge test." It is this alleged failure to have used the surge test which is the basis for its claim of negligent repair, since the experts conceded that all mechanical steps taken in repairing the rotor were proper. In short, the real problem was one that existed when the rotor was first delivered to Kaiser, according to these experts. None of the 1981 repairs in those circumstances could have caused the accident. This was not a case to recover independently for negligent repair but one to recover in strict liability.

V.

Such were the conflicting positions of the parties on the nature of the action herein. The district judge did not, in his opinion, expressly determine that the action was in products liability. This, however, is implicit in his decision. He found the case controlled by *Star Furniture*, *supra*, a decision which was equivalent to a finding that the action was in strict liability in tort, and this conclusion seems correct. The doctrine of strict liability in tort was formulated specifically

for litigation between manufacturer and customers arising out of a sale of products. *See* 63 Am. Jur. 2d *Products Liability* § 529, at 727. It "applies to both the manufacturer and the seller, who are engaged in the business of selling such product which is expected to and does reach the user without substantial change in the condition in which it was sold." *Morningstar*, 253 S.E.2d at 683 n.22. The essence of such suits was well stated by Justice Blackmun in *East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858 (1986):

> The paradigmatic products-liability action is one where a product "reasonably certain to place life and limb in peril," distributed without reinspection, causes bodily injury. The manufacturer is liable whether or not it is negligent because "public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market.

Id. at 866 (citation omitted).

The benefits of the doctrine to the plaintiff in a case such as this are, as *Morningstar*, 253 S.E.2d at 677, said, "that it relieves [the plaintiff] of proving specific acts of negligence and protects him from the defenses of notice of breach, disclaimer, and lack of privity in the implied warranty concepts of sales and contracts," that, in effect, the doctrine of strict liability "relieve[s] the plaintiff from proving that the manufacturer was negligent in some particular fashion during the manufacturing process and to permit proof of the defective condition of the product as the principal basis of liability." This case fits that description.

The suit here arises from a sale to a customer-purchaser by a manufacturer of an article to be manufactured pursuant to certain requirements. Such a product not infrequently has breakdowns in the early period of use. The manufacturer in such a case must make repairs or corrections in the product in conformity with its implied warranty of merchantability and of good workmanship. These repairs or corrections are not separate from the sale of the article; they are merely steps taken to conform the product to the expected performance requirements of the product purchased. As such, they are an integral part of the manufacturer's bargained-for performance of supplying a

sound product per the purchase agreement. And this is why Westinghouse made no charge and filed no bill for the repairs and corrections made in 1981 and why Kaiser paid nothing for such repairs. Moreover, Kaiser's cause of action depends ultimately on establishing that the product, either from date of delivery or from the date of the correction in 1981, was a "defective product" to which was to be attributed the "event" in 1988. Thus, Kaiser's case is one which presents all the necessary elements of a products liability case.

We find further that the very precedents cited by Kaiser do not support its contrary view—in fact, they, if anything, lend support to Westinghouse's contention. *Skeen*, for instance, was a case by a purchaser of a mobile home seeking damages from the dealer from whom it had purchased the home and from the manufacturer of the home. The suit against the manufacturer, which is the one in the case analogous to the case here, was one for *breach of warranty* (a contract cause of action), not negligent repair. The manufacturer's defense to the warranty claim was a disclaimer clause in the contract between the manufacturer and dealer. However, the manufacturer had not pled the disclaimer, and the court held that, in the absence of an affirmative plea of the disclaimer, the manufacturer was barred from relying on the disclaimer. The judgment against the manufacturer was thus *in contract* under the warranty; it was not based on any theory of products liability or negligent repair. Moreover, the Supreme Court of West Virginia had not incorporated into the common law of West Virginia the doctrine of strict liability in tort in suits against manufacturers at the time this action arose and was decided.[3] *Elsey Ford*, *supra*, is equally inapplicable. In that case, Elsey Ford sued Solomon, the defendant, for the balance due on the purchase of a truck. Solomon responded with a counterclaim pleading breach of warranty arising out of a defect in the truck. In such an action, "lost profits" can be recovered. *See East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 873 (1986); *Basham v. General Shale*, 377 S.E.2d 830, 833 (W. Va. 1988). Had it sought to sue under strict liability in tort, it could not have recovered lost profits. *See Star Furniture*, 297 S.E.2d at 859-60 ("The proper relationship between tort law and the

[3]*Skeen* was decided in 1971; *Morningstar*, which is the authority by which the doctrine of strict liability in tort was incorporated into the common law of West Virginia, was decided eight years later in 1979.

Uniform Commercial Code requires that lost profits be pursued under a warranty or contract theory cause of action rather than strict liability"). It is true that Solomon had two other counterclaims which were unquestionably suits for negligent repair under independent contracts of repair, in neither of these cases was there a purchase and sale, and thus no action in strict liability was available. It is evident from this review of its supporting authorities that such authorities lend no support to Kaiser's theory of its action; in fact, they support the conclusion that Kaiser should have sought relief in contract under a breach of warranty claim if it wished to recover lost profits, which was its primary claim herein. We now turn to the law controlling in this appeal.

VI.

We begin a review of the law applicable in this case, as did a recent scholarly Note, by observing that traditionally, "both contract [warranty] and tort [negligence] provide[d] the consumer [such as the plaintiff herein] with a remedy to recover damages caused by a defective product." Elizabeth A. Heiner, Note, *Sunnyslope Grading, Inc. v. Miller, Bradberg & Risberg, Inc.: What Recovery for Economic Loss —Tort or Contract*, 1990 Wis. L. Rev. 1337 (1991). While the two doctrines had similarities and originally were constrained by like concepts of privity, they clearly differed in their purposes and often in their results. As the Note just cited observes:

> While contract remedies protect the parties' expectations, tort remedies impose a duty on the manufacturer to market goods that are safe and suitable for their intended use. Contract remedies protect society's interests in the performance of promises. By contrast, negligence and strict liability claims protect society's interest in freedom from harm.

Id. at 1340-41. As we have said, whether suing a manufacturer in tort or contract, plaintiffs had long been hobbled in their right of recovery by a narrow rule of privity. But, particularly after the 1960s, such a rule came under the sharp criticism that "[t]he obligation of the manufacturer should not be based alone on privity of contract. It should rest, as was once said, upon 'the demands of social justice.'" *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 83 (N.J. 1960),

quoting Mazetti v. Armour & Co., 135 P. 633, 635 (Wash. 1913). This feeling was generated by a growing recognition of the rapid changes in marketing practices. Privity, it was said, had been acceptable "when marketing conditions were simple, when maker and buyer frequently met face to face on an equal bargaining plane and when many of the products were relatively uncomplicated and conducive to inspection by a buyer competent to evaluate their quality" but "[w]ith the advent of mass marketing, the manufacturer became remote from the purchaser, sales were accomplished through intermediaries, and the demand for the product was created by advertising media. In such a recovery, it became obvious that the consumer was the person being cultivated," and that the old standards of privity were no longer acceptable. *Id.* at 80-81 (quotations omitted). As Justice Blackmun well put it, "Products liability grew out of a public policy judgment that people need more protection from dangerous products than is afforded by the law of warranty." *East River*, 476 U.S. at 866.

The promulgation in *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963), of the modern doctrine of strict liability in tort, which freed the plaintiff of the restraints of privity, disclaimer, etc., resulted.

Judge Traynor in *Greenman* formulated this doctrine of strict liability in tort thus:

> A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.

Id. at 900.

In concluding this part of his opinion, Judge Traynor said:

> To establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the [product] in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the [product] unsafe for its intended use.

Id. at 901.

Two years after *Greenman*, the American Law Institute incorporated the strict liability doctrine in its Section 402A of the *Restatement (Second) Torts*, declaring:

> One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer or to his property. . . .[4]

By 1982, some forty states had announced their adoption of the doctrine by judicial decision, four had done so by legislation, and six either had not acted or had refused to adopt. William R. Clement, Jr., Note, *Strict Liability and Warranty in Consumer Protection*, 29 Washington & Lee L. Rev. 1347, 1352 (1982). The United States Supreme Court, acting in its admiralty jurisdiction, adopted the doctrine. *See East River*, 476 U.S. at 865. The West Virginia Supreme Court also adopted the doctrine, by judicial decision, in *Morningstar*, 253 S.E.2d at 680. In adopting the doctrine, however, the Court was anxious to underscore that strict liability was not absolute liability and that so to characterize it would be a "misnomer." *Id.* at 677, *quoting Dippel v. Sciano*, 155 N.W.2d 55, 63 (Wis. 1967). The essential purpose of the doctrine was not to provide absolute liability but to relieve the plaintiff in the products liability suit "of proving specific acts of negligence and [to] protect[ ] him from the defense of notice of breach, disclaimer, and lack of privity in the implied warranty concepts of sales and contracts" and to make "proof of the defective condition of the product . . . the principal basis of liability." *Id.* In effect, "defect is the conceptual linchpin that holds products law together; a system of liability without defect is beyond the capacity of courts to implement." Henderson and Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability without Defect*, 66 New York L. Rev. 1263, 1267 (1991). However, as the statements of the doctrine as given above indicate, there is "a notable lack of unifor-

[4]As this language indicates, the doctrine, as initially promulgated, was limited to "injury to a human being"; the doctrine was quickly extended to damage to any property of the plaintiff *other* than damage to the product itself. *East River*, 476 U.S. at 866-67.

mity" in arriving at a precise definition of the "linchpin" term, "defective." *Morningstar*, 253 S.E.2d at 680. This was pointed out by the Court in *Morningstar*, when, after reviewing some of the definitions of a "defective" condition under the doctrine, the Court determined that, so far as it was concerned, the appropriate test for defectiveness was "whether the involved product is defective in the sense that it is not reasonably safe for its intended use." *Id.* at 683. Other authorities have given different statements of the definition. Section 402A, *Restatement (Second) Torts*, defines the defect as one which is "unreasonably dangerous." *East River*, 476 U.S. at 866, requires that the defect be one "reasonably certain to place life and limb in peril." *Capitol Fuels*, 382 S.E.2d at 313, refers to the necessity of a "dangerous defect or design," language which it took from *Star Furniture*, 297 S.E.2d at 858-59. Perhaps the most precise definition, though somewhat awkwardly appearing, is "unreasonably unsafe," which was used by this Court in *Purvis v. Consolidated Energy Products Co.*, 674 F.2d 217, 222 (4th Cir. 1982). What is common to all these definitions is the idea that "defect" in the strict liability context is not synonymous with ineffectiveness or "ordinary" malfunction; the "defect" must be one that is unreason ably unsafe for the intended use of the product. It is the safety and dangerousness of the defect that is the essential element of the doctrine.

While the principles discussed are generally accepted by all the courts which have adopted the strict liability in tort doctrine, there is one issue on which there is a sharp conflict among the authorities. This conflict relates to recovery for damages caused to the product itself. The conflicting views on this difference were carefully reviewed by Justice Blackmun in *East River*, 476 U.S. at 868-75. The Court in that case, making a distinction between "tort recovery for physical injuries and warranty [or contract] recovery for economic loss," saw such distinction to be "not arbitrary" but fully in accord with the differing purposes of tort and contract recoveries in products liability cases. *Id.* at 871. As the Court said,

> the tort concern with safety is reduced when an injury is only to the product itself. . . . In contrast, when a product injures itself, the commercial user stands to lose the value of the product, risks the displeasure of its customers who find that the product does not meet their needs, or, as in his

> case, experience increases costs in performing a service. . . . Damage to a product itself is most naturally understood as a warranty[5]

Id. at 871-72.

The West Virginia Supreme Court in *Star Furniture*, however, had decided prior to *East River* to take what it regarded as an intermediate position in the recoverability of damages to the product itself. It recognized the distinction between the contract suit in warranty and the strict liability in tort action. *Star Furniture*, 297 S.E.2d at 858-60. In keeping with that distinction, it held that a strict liability action may be utilized "to recover for damage to property other than the defective product" but when loss suffered is an economic loss, the injured party must pursue the remedies provided by the Uniform Commercial Code, subject to the statute of limitations contained therein." *Id.* at 857-60. In short, "[t]he proper relationship between tort law and the Uniform Commercial Code requires that lost profits be pursued under a warranty or contract theory cause of action rather than strict liability." *Id.* at 859-60.[6] Thus, so far as injury to the product itself, the West Virginia rule is that only "property damage to defective prod-

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[5]Kaiser has apparently not filed a warranty action. It is suggested by Westinghouse that this failure is because the statutes of limitation (repose) applicable in such cases has long since run. *See Taylor v. Ford Motor Co.*, 408 S.E.2d 270, 273 (W. Va. 1991).

[6]This is not a rule unique to West Virginia; it is the general rule adopted in practically all jurisdictions. As the Court said in *Jones & Laughlin Steel Corp.*, 626 F.2d at 286, "even in actions for negligence, a manufacturer's liability is limited to damages for physical injuries and there is no recovery for economic loss alone."

This same thought was declared in Mark A. Kaprelian, Note, *Privity Revisited: Tort Liability by a Commercial Buyer for a Defective Product's Self-Interested Damage*, 84 Mich. L. Rev. 517, 520 (1985):

> It is generally accepted that economic losses, at least when unaccompanied by any physical damage, are not recoverable in an action based on strict tort liability. The rationale for this rule is that the buyer's economic interests are adequately protected by the Code, and subjecting a seller to strict liability for exclusively economic losses would displace the legislatively enacted Code framework.

ucts which results from a sudden calamitous event is recoverable under a strict liability cause of action." *Id.* at 859. In adopting this rule, the Court found that it was achieving a proper adjustment of "the tension between the tort doctrine of strict liability and contract theory embodied in the Uniform Commercial Code." *Id.* at 858.

Of course, the *Star Furniture* rule with reference to damage to the product itself is different from that adopted later by the United States Supreme Court in *East River*, where the damage was the result of a "sudden calamitous event." In fact, the Court in *East River* discussed and rejected as illogical the distinction made by *Star Furniture* on the right of recovery for damage to the product when the damage results from an "abrupt, accident-like event." *East River*, 476 U.S. at 870. Practically all the cases decided subsequently to *East River* have followed *East River* on this holding; in fact, some courts which had reached a result similar to that of *Star Furniture* on this issue later, after *East River*, reversed their position to conform with that of *East River*. Compare, *Aloe Coal Co. v. Clark Equipment Co.*, 816 F.2d 110, 116-17 (3d Cir. 1987), *cert. denied*, 484 U.S. 853 (1987), and *Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co.*, 652 F.2d 1165, 1172 (3d Cir. 1981). The West Virginia court, however, decided subsequent to *East River* not to abandon the rule stated by it in *Star Furniture* because of the decision in *East River* and, despite *East River*, to reaffirm its ruling in *Star Furniture*. *Capitol Fuels*, 382 S.E.2d at 313. Accordingly, under West Virginia law, damage to the product itself can be recovered in a strict liability suit but *only* if the damage was the result of a "sudden calamitous event."

We distill from this review of the pertinent decisions of the West Virginia courts two principles which are dispositive of the issues in this case if one assumes, as we do, that the action herein is basically a strict liability in tort action:

(1) Lost profits connected with the sale of a product are not recoverable under the West Virginia doctrine of strict liability in tort; such damages are recoverable only in contract under the Uniform Commercial Code;

(2) Damages for injury to the defective product itself in a product liability suit are recoverable only if such damages are the result of a "sudden calamitous event."

We proceed to apply these principles to the facts of this case.

VII.

Kaiser seeks recovery in this action for two specific items of damages. The first is a claim for lost profits arising out of the forced discontinuance of operations of its plant by reason of the injury on December 3, 1987 to its generator operation; and the second is for damage to the generator by the failure of the generator on the same date. The first claim is clearly without merit in this strict tort liability suit because, as we have seen, lost profits are not recoverable in a strict-liability-in-tort action under the West Virginia doctrine of strict liability in tort. It follows ineluctably that Kaiser's claim for lost profits in this case was properly dismissed by the district judge—and this result is equally true whether considered solely under the allegations of the complaint or under the expanded record which Kaiser seeks to establish in its presentation of new evidence in support of its motion under Rule 59 to vacate the judgment herein.

The claim for damages to the defective product, though not necessarily as clearly impermissible as the claim for lost profits, is actually no more tenable. Certainly, the district judge, who had only the facts as set forth in the complaint and decided the case on that basis, correctly dismissed the claim because the plaintiff made no charge that the rotor was either "dangerously defective" or that the damage to the product was the result of a "sudden, calamitous event."[7] Under those circumstances, damages for injury to the product itself were not recoverable in strict liability. Both a finding of a "defective product" and a finding that the damage was the result of a "sudden calamitous event" are the two essential elements of a strict liability action for

[7]Kaiser recognized that the allegations of the complaint omitted any statement that the damage to the product was attributable to a sudden calamitous event. Since the court was deciding the case on the basis of the allegations in the complaint itself, this omission admittedly would be fatal to any right of Kaiser to recover under the theory of strict liability. It therefore asked in its brief and in oral argument that we at the appellate level order an amendment to the complaint by adding the words that the damage to the product was attributable to a sudden calamitous emergency. Manifestly, we do not have the power to authorize such amendments at the appellate level.

recovery of damages to the product itself. We, therefore, affirm the decision of the district judge in dismissing part of Kaiser's action. Kaiser, however, has sought by its motion to vacate the judgment under Rule 59, and has supplied additional evidence that relates to this claim. While not obligated to, we proceed to consider this additional evidence in connection with the relevant standards for a strict liability action.

Kaiser has submitted evidence from expert witnesses relating to the existence of a defect in the rotor, which these experts allege caused the accident on December 8, 1989. These witnesses testified that there was a "phase-to-phase fault . . . in the rotor windings," creating "a cavity in the windings" or coils of the rotor. It was the theory of such witnesses that this defect would have been revealed by a "surge test" which they thought should have been performed when Kaiser returned the rotor to Westinghouse after the slippage of the rotor on the shaft on the second day of the spare rotor's operations in April, 1981. According to those witnesses, the "cavity" in the rotor's windings would have been corrected had Westinghouse utilized a surge test, discovered the problem, and corrected it. The difficulty with this theory is that the problem with the rotor in April, 1981, was not in the safe operation of the rotor; the rotor apparently worked satisfactorily and safely on the approximately two days the rotor was operated in 1981. The only problem experienced in the operation of the rotor in 1981 was that the rotor slipped and was hitting against other parts of the generator. Under such a circumstance, nothing indicated a need for a surge test or suggested that there might be a "cavity" in the rotor's coils.

Moreover, there is a question whether the "cavity" (if it existed) rendered the rotor a "dangerous" product, not "reasonably safe." The rotor had a "circuit breaker" which operated to cut the generator off immediately if any problem arose in the operation of the rotor. That "circuit breaker" worked perfectly on December 3 when the "event" occurred. The whole event consumed about "two seconds," according to the only eyewitness of the event. A small, harmless amount of electricity escaped during that period, but the two witnesses (only one testified) evidenced no fright, experienced no shock, and suffered no injury. Neither was there any damage to any property other than to the product itself.

More importantly, it certainly cannot be argued that what occurred to the rotor on December 3, 1987 was a "sudden, calamitous event," and that is an essential element for a permissible claim for injuries to the product itself in a strict liability lawsuit. "Calamitous" is a strong term;[8] it unquestionably does not apply, it would seem, to an event that, when experienced by the only persons present, caused those present to assume they were under no threat of any harm. Copeland testified that he and his brother actually "didn't feel that the rotor had sustained any damage," much less felt themselves in any peril. He explained his reaction to the event: "We were confident that one of our stress cones had failed and that's the first place we went to look. Duane [his brother] and I immediately went down to the basement with a flashlight and looked at our stress cones." He explained his reason for assuming that one of the stress cones had failed was that "it would sound the same way and act the same way as the rotor had on this occasion in December, 1987."

It is obvious from this statement that shutoffs for failure of a cone stress were not something the witness had not experienced frequently before and that such event did not frighten him. Otherwise, he would not have recognized the "sound" and the action. Moreover, as we have already observed, no one experienced the slightest physical or psychological injury as a result of this event. It is true that there was some minimal "eking" or "tracing," indicating electric voltage being discharged. As we said, the evidence indicated it was minimal. It left no marking on the floor or walls of the building; it left no physical signs on the person of those present. The entire sequence of events on December 3, "from the time when the switch was flipped [to start the motor,] the motor starts, the hum begins [of the coils saturating], [and the time] as the starter kicks off the motor, was no more than four to five seconds." At another point, the witness fixed the time that the coils began to saturate and the circuit breaker kicked the motor off as "a couple of seconds." We would conclude that as a matter of law there was no "calamitous event" on this occasion of sufficient magni-

[8]The new American Heritage Dictionary of the English Language (3d ed. 1992) defines "calamitous" as "disastrous" or "causing or involving calamity." It defines "calamity" as "an event that brings terrible loss, lasting distress or severe affliction" or "disaster." It is clear from this definition that an event such as occurred in this case could not qualify as "calamitous."

tude to permit a finding that the damage to the product here was the result of a "calamity." Under such a conclusion, the damage to the product would not be recoverable in strict liability.

It follows that, even were we to consider the added evidence included in Kaiser's addendum to its motion to vacate the judgment, we would still affirm the dismissal of this action by the district court.

AFFIRMED

B

FILED JANUARY 8, 1993

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 90-2189
(CA-88-1512-A)

Kaiser Aluminum and Chemical Corp.,

Plaintiff - Appellant,

versus

Westinghouse Electric Corp.,

Defendant - Appellee.

O R D E R

The Court amends its opinion filed December 2, 1992 as follows:

On page 14, first paragraph, line 20 -- the space in the word "unreasonably" is deleted.

On page 15, line 1 of indented quotation -- the word "increases" is corrected to read "increased."

By the Court - By Direction

/s/ Bert M. Montague
Clerk

C

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
January 7, 1993

No. 90-2189

CA-88-1512-A

KAISER ALUMINUM AND CHEMICAL CORPORATION,
A Delaware Corporation

Plaintiff - Appellant

v.

WESTINGHOUSE ELECTRIC CORPORATION, A
Pennsylvania Corporation

Defendant - Appellee

On Petition for Rehearing With Suggestion for
Rehearing In Banc

Appellant filed a petition for rehearing with suggestion for rehearing in banc. No member of the

Court requested a poll on the suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Russell, with the concurrence of Judge Hill (Senior Circuit Judge of the United States Court of Appeals for the Eleventh Circuit, sitting by designation) and Judge Ward (Senior United States District Judge for the Middle District of North Carolina, sitting by designation).

For the Court,

/s/ Bert M. Montague
Clerk

D

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

AT PARKERSBURG

Kaiser Aluminum & Chemical Corporation, a Delaware corporation,

Plaintiff,

vs.

Westinghouse Electric Corporation, a Pennsylvania Corporation

Defendant.

CIVIL ACTION NO. A:88-1512

PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS RULE 52(b) AND 59(e) MOTIONS

INTRODUCTION

The Court should amend its Memorandum Order and Opinion to deny defendant's Rule 12(b)(6) motion and should also vacate its Judgment Order entered pursuant thereto.

The allegations of the complaint and the evidence adduced to date clearly show that plaintiff has pleaded

and can prove at trial sufficient facts to state and support a tort cause of action for negligent repair. The allegations of the complaint state the essential elements of a cause of action for negligent repair,[1] and also sufficiently allege (assuming arguendo such an allegation is necessary) a sudden calamitous event giving rise to physical damage to the rotor. Defendant's motion therefore should have been denied.

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[1] It is important to bear in mind that plaintiff's claim does not relate to the design or manufacture of the subject rotor. Those events occurred in 1976-77; whereas, the negligent repair was a totally independent event which occurred in 1981. Accordingly, this is not a products liability action, and the fact that the complaint does not contain strict liability terms of art (e.g. "design defect" and "inherently dangerous") is neither surprising nor pertinent.

BACKGROUND FACTS

Plaintiff's action is not a strict products liability claim against Westinghouse as manufacturer, and plaintiff's allegations do not in any way concern defendant's activities in manufacturing or designing the spare rotor. Instead, plaintiff's allegations only concern Westinghouse's negligent conduct in repairing the subject rotor. The fact that Westinghouse also manufactured this rotor several years before its repair activities is irrelevant.

Plaintiff's allegations state that defendant Westinghouse negligently repaired the spare rotor, and that as a direct and proximate result of defendant's negligent repair activities the spare rotor suffered immediate electrical failures when plaintiff attempted to energize and start the rotor on December 3, 1987. (See Complaint, attached as Appendix 1, at ¶¶ 13, 14, 17 and 18.) The Complaint further alleges that the immediate electrical failures in the spare rotor caused

physical damage to the motor generator set and rendered the aluminum mill inoperable for ten days, resulting in repair costs for the motor generator set and business interruption losses. (See Complaint, Appendix 1, at ¶¶ 19 and 20.)

Under the relaxed notice pleading requirements of Rule 8, plaintiff's allegations in the Complaint are indeed sufficient to state a claim for relief, and defendant's rule 12(b)(6) motion should have been denied.

POINTS AND AUTHORITIES

The Federal Rules expressly reject technical forms of code pleading, and provide that a plaintiff's claim for relief need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(e)(1), and 8(a)(2). The Federal Rules also mandate that all pleadings shall be so construed as to do substantial justice. Fed. R. Civ. P. 8(f). See also

Conley v. Gibson, 78 S. Ct. 99, ____, 355 U.S. 41, 47-48, 2 L.Ed.2d 80, 85 (1957).

Because of these underlying principles of notice pleading, a Rule 12(b)(6) motion to dismiss for failure to state a claim "is viewed with disfavor and is rarely granted." Wright and Miller, Federal Practice and Procedure: Civil § 1357, page 598. Thus, when considering such a motion the Court is to deem as admitted all well pleaded allegations of fact and the plaintiff is entitled to receive the benefit of all reasonable inferences therefrom. L.S. Good and Co. v. H. Daroff and Sons, Inc., 263 F. Supp. 635, 645 (N.D. W. Va. 1957). Thus, a court is not permitted to impose a sanction as drastic as dismissal to force legally artistic pleadings; instead, the court "must look beyond the mountain of words to the meaning sought to be conveyed." Stanley v. Harper Buffing Machine Co., 28 FRD 579, 581 (D. Conn. 1961).

The established test which the Court must apply to determine the sufficiency of the complaint on a Rule 12(b)(6) motion confirms that such motions are disfavored, and that extreme circumstances must exist before such a motion will be sustained. As stated by the U.S. Supreme Court:

> . . . a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Conley v. Gibson, 78 S. Ct. 99, 102, 355 U.S. 41, 45-46, 2 L.Ed.2d 80, 84 (1957). See also Thompson v. Brotherhood of Sleeping Car Porters, 316 F.2d 191, 199 (4th Cir. 1963); and W.H. Williams v. Wheeling Steel Corp., 266 F Supp. 651, 654 (N.D. W. Va. 1967).

The Court Should Have Denied Defendant's Rule 12(b)(6) Motion Because the Liberally Construed Allegations of the Complaint do State, and Plaintiff can Prove, Facts Sufficient to State and Support a Tort Claim for Negligent Repair.

Under the governing principles of review, it is clear that defendant's Rule 12(b)(6) motion should have been denied (1) because the allegations of the complaint, when liberally construed with all inferences in favor of plaintiff, do state facts sufficient to state a claim for relief; and (2) because the deposition evidence to date demonstrates that plaintiff can, in fact, prove facts sufficient to state a claim for relief.

Plaintiff's claim against Westinghouse is based solely upon the theory of negligent repair -- that is, the conduct of defendant in repairing the spare rotor component. Therefore the sufficiency of plaintiff's negligent repair allegations should be analyzed under the holdings of negligence/ negligent repair cases, not strict liability cases. However, whether the allegations are reviewed on negligence or strict liability principles is not

of concern, because defendant's rule 12(b)(6) motion must be denied under both principles.

Negligence Principles

Plaintiff's allegations of negligence and negligent repair clearly satisfy the minimum pleading requirements. To establish negligence, plaintiff must establish (1) that defendant had a duty; (2) that defendant breached its duty; and (3) that plaintiff suffered damages as a result. Gasber v. Coast Construction Co., 60 S.E.2d 193, 195 (W. Va. 1950). With respect to negligent repair, West Virginia law clearly holds that one who undertakes to repair is responsible to fully perform such repair, and the failure to do so constitutes negligence. Skeen v. C. & G. Corp., 155 W.Va. 547, 186 S.E.2d 493 (1971); Elsey Ford Sales v. Solomon, 280 S.E.2d 718 (W. Va. 1981).

In Skeen, the court affirmed the giving of a jury instruction that permitted recovery for negligent repair if the following elements were shown:

1. That the plaintiff called the defendant for repair service;

2. That defendant was aware of defective functioning in the relevant equipment;

3. That defendant thereafter did undertake the repair or correction of such defects, if any; and

4. That defendant's negligent repair proximately caused the loss complained of.

Skeen, supra at page 497. In that case, plaintiff purchased a mobile home and experienced problems with the electrical system and the water heater. He contacted the seller, Casto Trailer Sales, to report these problems and Casto dispatched one of its repair men to inspect the problems. The repair man acknowledged the problems and told plaintiff to leave the electrical current on and that he would be back the next day to complete

the repairs. On the following day, the water heater caused a fire which destroyed plaintiff's trailer and its contents. The jury found that plaintiff had proved the necessary elements of negligent repair and a verdict was entered against Casto Trailer Sales on that theory. After an intermediate reversal by the Circuit Court, the verdict and judgment was reinstated by the West Virginia Supreme Court of Appeals.

In its complaint, plaintiff clearly has alleged the basic elements of negligence/negligent repair. Plaintiff alleged that Westinghouse had a duty to exercise reasonable care in performing repairs, that defendant Westinghouse failed to exercise reasonable care in the repairs, and that plaintiff suffered damages as a result of that negligent repair. (See allegations contained in Complaint, Appendix 1, at ¶¶ 13, 14 and 18.) Moreover, deposition testimony, taken while the motion to dismiss was pending, clearly creates jury issues regarding the requisite elements of plaintiff's claims.

Former employees of defendant testified that Westinghouse recommended that the spare rotor be repaired by Westinghouse and that it undertook to return the rotor to Kaiser in operable condition ready for use. (Misage dep. tr. Vol II, attached as Appendix 2, pp. 37-38; Merrill dep. tr., attached as Appendix 3, pp. 21-22.) Westinghouse also knew that the rotor was critical to Kaiser's production and that business losses would result if the rotor were inoperable. (Misage dep. tr. Vol. I, Appendix 2, pp. 11-12; Merrill dep. tr., Appendix 3, p. 13). Three experts have testified that Westinghouse departed from industry standards in failing to conduct certain electrical testing during the repairs and that those departures caused the failure of December 3, 1987. (Steadman dep. tr., Appendix 4, pp. 79-80, 119; Kunz dep. tr., Appendix 5, pp. 161-168; Riffe dep. tr., Appendix 6, p. 197.) Testimony by another former Westinghouse employee has established that he inspected the rotor when it arrived at

defendant's repair facility and that he recommended in writing one of the critical electrical tests that Westinghouse failed to perform (Royals dep. tr., Appendix 7, pp. 33-35, 39; and plaintiff's ex. 21, Appendix 8). Stuart Gladstein has provided deposition testimony with regard to the extent of plaintiff's property damage and lost profits.[2]

Based on the current state of the record, Kaiser has not only properly pleaded a cause of action for negligent repair in its complaint, it has also obtained sworn deposition testimony supporting every element of its claim. Far from merely meeting the pleading requirements of Rule 8, this evidence would fully

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[2] Lost profits are clearly recoverable under West Virginia law in a negligence action where such damages flow directly from the occurrence and are foreseeable. Hardman Trucking v. Poling Trucking Co., Inc., 346 S.E.2d 551, 555 (W. Va. 1986).

support a jury verdict in Kaiser's favor. Consequently, justice requires that the Court vacate its Order and Judgment of Dismissal.

Strict Liability - Sudden and Calamitous Event

In its Memorandum Opinion and Order, the court opined that although plaintiff's action is based in negligent repair, the right to recover would nevertheless be governed by the strict liability requirement of a "sudden and calamitous event," which was set forth in Star Furniture Co. v. Pulaski Furniture, 297 S.E.2d 854 (W. Va. 1982). That case addressed a plaintiff's right to recover under a strict products liability theory against a manufacturer. Assuming, arguendo, that the requirement of a sudden and calamitous event has analogous application to a negligent repair claim, the court should still have denied defendant's Rule 12(b)(6) motion. The allegations of plaintiff's complaint, when liberally construed, do sufficiently state and permit the

inference that the spare rotor failure was a sudden and calamitous event.

In the complaint, plaintiff alleges that when it attempted to energize the spare[3] rotor on December 3, 1987, "electrical failures occurred immediately in the spare rotor - shaft component," and resulted in "physical damage" to the motor generator set and in repair costs and business interruption losses. (See complaint, Appendix 1, at ¶¶ 17-20, emphasis added.) Although the words "sudden and calamitous" are not specifically used, the allegations, construed liberally, obviously

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[3] The fact that this failed rotor was a spare has no bearing on the sudden and calamitous nature of the failure. See Memorandum Opinion and Order a pp. 3-4. Otherwise, a motorist using a negligently repaired spare tire would have no tort cause of action if the spare tire suddenly blew during the first mile of use and caused extensive damage to the plaintiff's automobile.

permit the inference of a sudden failure, and plaintiff is entitled to this inference. L & S Good Co. v. H. Daroff, 263 F. Supp. 635, 645 (N.D. W.Va. 1967). As such, the Rule 12(b)(6) motion should have been denied. Indeed, the court is not permitted to impose a sanction as drastic as dismissal simply to force artistic pleading. Stanley v. Harper Buffing Machine Co., supra, 28 F.R.D. at 581.

Defendant's Rule 12(b)(6) motion should also have been denied because it does not appear "beyond a doubt" that the plaintiff can prove no set of facts showing a sudden and calamitous event. Conley v. Gibson, 78 S.Ct. 99, 102, 355 U.S. 41, 45-46, 2 L.Ed.2d 80, 84 (1957).

In fact, the evidence developed through discovery confirms beyond a doubt that this failure was indeed a "sudden and calamitous event."[4] The deposition

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[4] The depositions described below had not been (continued...)

testimony of Mr. Duane Alderman provides evidence of the sudden and calamitous nature of the failure. See referenced pages Duane Alderman deposition, attached as Appendix 9.

Mr. Alderman was foreman of the crew from Eastern Electric Co. that had installed the spare rotor in the motor generator set. Mr. Alderman testified that he was within a few feet of the spare rotor when it was energized and failed. (Appendix 9, page 158, 190.) When the power was applied, almost instantaneously voltage "etching" [the sound of voltage being discharged -- page 163) was getting louder and louder and louder." (Appendix 9, page 161.) At that point, either fire or voltage of electricity escaped from the motor generator set and spread across the concrete floor, surrounding Mr. Alderman and his brother.

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[4](...continued)
taken at the time defendant's motion was submitted and briefed by the parties.

(Appendix 9, page 161.) Described another way, the Aldermans were surrounded by "an electrical fire caused by this voltage of 13,000 volts getting outside of where it was supposed to be contained". (Appendix 9, pages 165-66.) Mr. Alderman testified that the electricity/fire that surrounded him was on the floor, and "just everywhere." (Appendix 9, pages 185-186.)

Understandably, Mr. Alderman and his brother were fearful for their safety as they tried to avoid the fire/electricity. According to Mr. Alderman, his brother asked for help, and Mr. Alderman replied "stand still" because the escaping fire/electricity was all around them. (Appendix 9, page 161.)

The electricity/fire was not an expected type of failure according to Mr. Alderman, because it was "a phenomenon that was uncharacteristic to electrical theory," and didn't act like he would have expected electricity to act. (Appendix 9, pages 187-188.) The whole sequence of the loud etching, and the escaping

electricity/fire occurred almost instantaneously after power was applied to the spare rotor. (Appendix 9, page 161.)

Photographic evidence confirms that the spare rotor suffered severe, actual physical damage as a result of the sudden failure. (See photos attached as Appendices 10 and 11.) The evidence of the physical damage is further confirmed by repair costs totaling $125,000 as a result of this discrete, sudden failure. (See document attached as Appendix 12.) As described by Mr. Alderman, components of the spare rotor were "completely disintegrated" and "destroyed" as a result of the sudden electrical failure. (Appendix 9, pages 173-174.)

The sudden failure of the rotor causing physical damage and a dangerous condition to property and persons is exactly the damage which is to be treated by tort law rather than contract or warranty law. Star Furniture, supra, 297 S.E.2d at p. 859.

In other cases involving similar damage circumstances -- fire causing physical damage -- the controlling decisions hold that the actions are to be governed by tort principles. See Capitol Fuels, Inc. v. Clark Equipment, 382 S.E.2d 311, 313 (W.Va. 1989) (Defect in a front-end loader caused an abrupt fire which destroyed the loader. Court stated the defect created a potentially dangerous situation and the risk associated with the fire-causing defect was not one ordinarily contemplated by a purchaser. Moreover, the West Virginia Supreme Court of Appeals expressly rejected the contention that the existence of a commercial relationship should insulate a defendant from negligence and strict liability claims where damage to the subject product occurred from a sudden, calamitous event. 382 S.E.2d at 312); Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 1165, 1174-75 (3rd Cir. 1981) (Lack of fire suppression system in a forklift caused fire damage to the forklift. Held to be sudden,

dangerous occurrence giving rise to tort recovery); Hales v. Green Colonial, Inc., 490 F.2d 1015, 1021-1022 (8th Cir. 1974) (Fire caused by defective heater held to give rise to a tort claim) (Pennsylvania Glass and Hales both were discussed in Roxalana Hills, Ltd. v. Masonite Corp., 627 F. Supp. 1194, 1197 (S.D.W. Va. 1986).); and Cloud v. Kit Manufacturing Co., 563 P.2d 248 (Ala. 1977) (Fire in mobile home caused by flammable materials held to be sudden calamitous event giving rise to recovery in tort) [discussed in Star Furniture Co. v. Pulaski Furniture Co., supra, 297 S.E.2d at page 858].

In Roxalana, this court stated that West Virginia would use a 3-prong test originally set forth in Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co., 652 F.2d 2 1163 (3rd Cir. 1981) to distinguish damages giving rise to tort claims from those "bad bargain" damages (such as faded drapes or worn carpeting) more closely identified with contract or

warranty claims. Under that test, the court is to consider:

(1) The type of risk involved;
(2) The nature of the defect, and
(3) The manner in which the injury arose.

Under test elements No. 1 and 2 -- the type of risk and the nature of the defect -- this court stated that an ordinary malfunction "is distinguished from those which pose a distinctly and unreasonably dangerous condition." Roxalana at p. 1196. Mr. Alderman's testimony establishes that electricity escaped from the motor generator set on December 3, 1987 at the time of failure, and surrounded his brother and him. A few seconds later, a relay circuit broke the current and prevented further danger to persons or property. (Alderman dep. tr., Appendix 9, at pp. 161-162.) But for this circuit breaker, Mr. Alderman and his brother would have continued to face an unreasonably dangerous condition in that several thousand volts of electricity were surrounding them and spreading on the

concrete floor. Obviously, this escaping electricity/fire was not "ordinarily contemplated." Mr. Alderman stated that this situation was not characteristic of anticipated electrical operations. (Alderman dep. tr., Appendix 9, at pages 187-188.)

The characteristic of the "risk" under element No. 1 is also one that gives rise to a tort type of action. Unlike a contract-type risk "which invariably will be asserted solely by the purchaser," the risk that occurred upon the failure of this rotor presented claims that could have been asserted not only by Kaiser, but by Mr. Alderman and his brother, and by any other bystanders who might have been injured by the escaping electricity/fire. See Roxalana at p. 1196.

The tests discussed about in products liability actions have application to a negligent repair cause of action only by analogy. Nevertheless, the evidence shows plaintiff can prove a tort claim based on a sudden, calamitous event. For this additional reason,

defendant's Rule 12(b)(6) motion should have been denied.

Plaintiff Was Not Required To Allege That The Rotor Failure Was Attributable To An Inherently Dangerous Defect or Design Of The Rotor, Because Plaintiff's Action Is Not Based In Strict Tort Liability.

In its Memorandum Order and Opinion, the court also reasoned that the complaint failed to state a claim because plaintiff did not allege that the rotor failed because of an inherently dangerous defect or design on the rotor shaft component. (See Memorandum Opinion and Order at page 3.) However, as previously stated, Kaiser's action is based on negligent repair, not strict product liability of a manufacturer. Therefore, no allegation of this type was made or required. For this additional reason, the defendant's Rule 12(b)(6) motion should have been denied.

CONCLUSION

For the foregoing reasons, plaintiff respectfully requests that its Motions be granted, that the Court's Memorandum Opinion and Order be amended to deny defendant's Rule 12(b)(6) motion, and that the Judgment Order be vacated.

Dated this 24th day of October, 1989.

ROBINS, KAPLAN, MILLER & CIRESI

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ATTORNEYS FOR PLAINTIFF

AFFIDAVIT OF SERVICE BY MAIL

STATE OF MINNESOTA)
) SS
COUNTY OF HENNEPIN)

Linda Florell, being first duly sworn on oath deposes and says that she is a secretary in the offices of Robins, Kaplan, Miller & Ciresi, Attorneys at Law, 1800 International Centre, 900 Second Avenue South, Minneapolis, Minnesota 55402; that on the 24th day of October, 1989, she made service of the following pleadings:

1. Plaintiff's Motion to Amend Findings and Judgment Pursuant to Fed. R. Civ. P. 52(b) and 59(e), and Request for Oral Argument;

2. Plaintiff's Memorandum in Support of its Rule 52(b) and 59(e) Motions; and

3. Plaintiff's Appendix in Support of its Rule 52(b) and 59(e) Motions.

by mailing true and correct copies thereof to:

Shawn P. George, Esq.
Jackson & Kelly
1600 Laidley Tower
P.O. Box 553
Charleston, West Virginia 25322

attorneys for defendant, First Class, postage paid.

_____

Linda Florell

Subscribed and sworn to before me
this 24th day of October, 1989.

_____

Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

Kaiser Aluminum & Chemical Corporation, a Delaware corporation,

Plaintiff,

v.

Westinghouse Electric Corporation, a Pennsylvania corporation,

Defendant.

Case No. _____

COMPLAINT

JURY TRIAL DEMANDED

---

1. Plaintiff Kaiser Aluminum & Chemical Corporation (hereinafter referred to as "Kaiser Aluminum") is a corporation incorporated under the laws of the State of Delaware, having its principal place of business in the State of California.

2. Defendant Westinghouse Electric Corporation (hereinafter referred to as "Westinghouse") is a corporation incorporated under the laws of the State

of Pennsylvania, having its principal place of business in the State of Pennsylvania.

3. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.00.

4. Jurisdiction over this action is based on diversity of citizenship under 28 U.S.C. § 1332.

5. Kaiser Aluminum operates an aluminum manufacturing facility in Ravenswood, West Virginia. This facility includes a 168 inch hot mill for aluminum.

6. The power for this 168 inch aluminum mill is generated through the use of certain equipment known as a "motor-generator" set.

7. Two major components of the motor-generator set include the stator component and the rotor/shaft component.

8. In 1976, Kaiser Aluminum ordered and purchased from defendant Westinghouse one motor-generator stator component, and one motor-generator rotor/shaft component for the 168 inch aluminum mill at

the Kaiser Aluminum facility at Ravenswood, West Virginia. These components were purchased as backup or spare components to be used in the event of a failure of the existing motor generator components that Kaiser Aluminum used for its 168" mill at Ravenswood, West Virginia.

9. Defendant Westinghouse manufactured and delivered the spare stator (Serial No. S.O. 88P636) and rotor/shaft (Serial No. S.O. 88P637) components to the Kaiser Aluminum facility at Ravenswood, West Virginia in 1978 or 1979. Kaiser Aluminum kept the spare stator component and rotor/shaft component in storage until April of 1981.

10. On April 26, 1981, the spare Westinghouse stator component and rotor/shaft component were installed in the 168-inch mill at the Kaiser Aluminum facility in Ravenswood, West Virginia after a breakdown of the existing stator and rotor/shaft components that had been in place.

11. On April 27, 1981, Kaiser Aluminum representatives at the Ravenswood, West Virginia facility observed that the Westinghouse spare rotor/shaft components (Serial No. S.O. 88P637) was malfunctioning, in that the rotor was observed to have been loose and to have slipped horizontally on the shaft. The slipping of this rotor caused damage to the rotor because the rotor came into contact with metal casing that surrounded the rotor on the north side.

12. In May of 1981, Westinghouse took possession of the spare rotor/shaft component, and agreed to fully correct and repair all malfunctioning and damage that the spare rotor/shaft component had experienced and sustained. Westinghouse performed these repairs at its facility in Round Rock, Texas.

13. Westinghouse had a duty to exercise reasonable care in performing the repairs to this spare rotor-shaft component.

14. Defendant Westinghouse Electric Corporation filed to exercise reasonable care and was negligent in performing the inspection and repairs on the Westinghouse spare rotor/shaft component because Westinghouse, by way of example and not limitation:

a. Failed to properly and fully investigate the circumstances of the spare rotor/shaft malfunction;

b. Failed to properly and fully examine and test the spare rotor/shaft assembly to determine the full nature and extent of its malfunction;

c. Failed to properly and fully repair the spare rotor/shaft component;

d. Otherwise failed to use reasonable care in performing repairs on the spare rotor/shaft component.

15. After performing the negligent repairs described above, defendant Westinghouse returned the

spare rotor/shaft component to the Kaiser Aluminum facility at Ravenswood, West Virginia, where the spare rotor/shaft component was placed into storage until early December, 1987.

16. In early December, 1987, the existing motor-generator set for Kaiser Aluminum's 168 inch mill suffered a breakdown. Kaiser Aluminum therefore removed the spare rotor/shaft component from storage and installed it in the 168 inch mill.

17. On December 3, 1987, plaintiff Kaiser Aluminum attempted to energize and start the 168 inch mill motor-generator set, which included the spare rotor-shaft component.

18. As a direct and proximate result of the negligent repairs made by defendant Westinghouse, as described in Paragraph No. 14 above, electrical failures occurred immediately in the spare rotor-shaft component.

19. As a direct and proximate result of the negligence of defendant Westinghouse Electric Corporation, plaintiff Kaiser Aluminum has incurred expenses for the repair of its motor-generator set and has suffered business interruption losses in excess of one million dollars ($1,000,000).

WHEREFORE, plaintiff Kaiser Aluminum & Chemical Corporation demands that judgment be entered against defendant Westinghouse Electric corporation in an amount in excess of one million dollars ($1,000,000) plus interest, costs and expenses as allowed by law, and such further relief as the Court deems appropriate.

Dated this 3rd day of November, 1988.

ROBINS, KAPLAN, MILLER & CIRESI

By_____
Richard L. Gill
William M. Lutz

1800 International Centre
900 Second Avenue South
Minneapolis, Minnesota 55402
(612) 349-8500

and

KAY, CASTO, CHANEY

By_____
Thomas V. Flaherty

P.O. Box 2031
Charleston, West Virginia

ATTORNEYS FOR PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
WEST VIRGINIA AT PARKERSBURG

Kaiser Aluminum & Chemical Corporation, a Delaware corporation,	)	
Plaintiff,	)	
v.	)	Civil Action No. A: 88-1512
Westinghouse Electric Corporation, a Pennsylvania corporation,	)	
Defendant.	)	

* * * * * * * * * * *

* ORAL DEPOSITION *

* OF *

* JAMES R. MISAGE *

* * * * * * * * * * *

EXAMINATION: By Mr. Gill - - - - - - - - - - - - - - - Page -

EXHIBITS

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Taken by Sylvia M. Vidaur
March 14, 1989

Q. If Kaiser couldn't meet orders, it stood the potential of losing business?

MR. GEORGE: Are you asking him whether he went through this process in May of '81, or whether he's going to agree with you now, as you're stating these questions to him?

MR. GILL CONTINUES:

Q. Back in 1981, was that your understanding?

A. Would you repeat that question again, please?

Q. Was it your understanding in May of 1981, that if Kaiser's hot mill production line was down, due to a problem with the MG set, that it stood the potential to lose business?

A. Yes.

Q. And obviously, if it lost business, it would be losing profits?

A. Yes.

MR. GEORGE: You know, to the extent that it was profitable, I mean, it would lose income.

MR. GILL: Yes.

MR. GEORGE: Right.

MR. GILL CONTINUES:

Q. To the extent that Kaiser's operations were profitable in nature?

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

AT PARKERSBURG

KAISER ALUMINUM &
CHEMICAL CORPORATION,
A DELAWARE CORPORATION,
Plaintiff

CIVIL ACTION NO.
A:88-1512

vs.

WESTINGHOUSE ELECTRIC
CORPORATION, A
PENNSYLVANIA CORPORATION,
Defendant

..*.*.*

DEPOSITION OF JAMES R. MISAGE

VOLUME II

On the 14th day of March, A.D., 1989, between the hours of 12:55 P.M. and 4:10 P.M. in the offices of McGINNIS, LOCHRIDGE & KILGORE, 1300 Capitol Center, Austin, Texas, before me, DIANA RAMOS, a Certified Shorthand Reporter in and for the State of Texas, appeared JAMES R. MISAGE, who, being by me

first duly sworn, gave his oral deposition on behalf of the Plaintiff in said cause, pursuant to the Federal Rules of Civil Procedure.

time.

Q. Apparently you were also saying to Kaiser that "There aren't any spare rotors that are readily available to be a substitute for this spare rotor," in other words. "There aren't any that have already been manufactured that are sitting around somewhere that we can send you"?

A. Right. It's not a shelf item. It's a special machine.

Q. So, as you say, Kaiser agreed to keep its fingers crossed during this period of time when the spare rotor was going to be repaired at Round Rock?

A. Yes.

Q. But I take it then that you understood that what Kaiser expected was to get back the spare rotor from Round Rock in operational condition?

A. Yes, in a minimum amount of time.

Q. Okay. And so that you understood that Kaiser expected that whenever the spare rotor was

returned to it that that would be a rotor that was ready for immediate installation?

A. Yes.

Q. And Kaiser was looking to Westinghouse to provide that spare rotor in that type of immediately operational condition after the Round Rock repairs?

A. Yes.

Q. And you basically on behalf of Westinghouse accepted that assignment?

A. Me personally?

Q. You and Mr. Merrill, the representatives of Westinghouse.

A. Yes.

Q. Okay. And that was the very effort that you yourselves felt was required to deal with that situation?

A. Yes.

Q. Okay. Now, once you left Ravenswood, did you immediately return to Round Rock?

A. Yes, to my knowledge I did. I don't remember going anywhere besides Ravenswood.

Q. Did you get back to Round Rock before the spare rotor arrived? I believe the documents show that the spare rotor arrived on May 6, which would be a Wednesday.

A. Yes. I got back before then.

Q. Mr. Merrill also?

A. Yes.

Q. Now, if I had showed up at the Round

IN THE UNITED STATES DISTRICT COURT

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AT PARKERSBURG

KAISER ALUMINUM &
CHEMICAL CORPORATION,
A DELAWARE CORPORATION,
Plaintiff

CIVIL ACTION NO.
A:88-1512

vs.

WESTINGHOUSE ELECTRIC
CORPORATION, A
PENNSYLVANIA CORPORATION,
Defendant

--*-*-*

DEPOSITION OF EDGAR MERRILL

On the 15th day of March, A.D., 1989, between the hours of 9:10 A.M. and 11:55 A.M. in the offices of McGINNIS, LOCHRIDGE & KILGORE, 1300 Capitol Center, Austin, Texas, before me, DOTTIE NORMAN, a Certified Shorthand Reporter in and for the State of Texas, appeared EDGAR MERRILL, who, being by me

first duly sworn, gave his oral deposition on behalf of the Plaintiff in said cause, pursuant to agreement of counsel for the respective parties as hereinafter set forth.

Q. And is that basically what Mr. Klos told you as well?

A. Yes, sir.

Q. Had anybody explained to you that this particular rotor was a spare rotor -- spare rotor in the sense that there had been some damage to the stator rotor that had been in use for several years at Ravenswood in late April of 1981 and that this rotor that had moved axially on the shaft had been installed as the spare rotor so that Kaiser could continue production?

A. Yes, we were aware of that.

Q. And did someone explain to you that this spare rotor was a critical component of Kaiser's hot mill production line?

A. We were certainly aware of that.

Q. In other words, you knew and understood that without that particular component in operation that particular hot mill couldn't operate?

A. Yes, sir.

Q. And obviously any finished products that were involved with the hot mill couldn't be manufactured or distributed?

A. That's correct.

Q. And I take it that while you were at

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT PARKERSBURG

KAISER ALUMINUM &
CHEMICAL CORPORATION,
a Delaware Corporation,

Plaintiff

CIVIL ACTION NO.
A:88-1512

vs.

WESTINGHOUSE ELECTRIC
CORPORATION, a
Pennsylvania Corporation,
Defendant

The deposition of DUANE YEAGER ALDERMAN was taken pursuant to the Federal Rules of Civil Procedure in the above-entitled action, on the 18th day of May, 1989, at 1:30 p.m., in the law offices of Jackson & Kelly, 1500 Laidley Tower, Charleston, Kanawha County, West Virginia, before Phyllis Haynes Edens, Certified Court Reporter and Notary Public in and for the State of West Virginia.

APPEARANCES:

RICHARD L. GILL, Attorney at Law
Robins, Kaplan, Miller & Ciresi
1800 International Centre
900 Second Avenue South
Minneapolis, MN 55402-3394
Counsel for Plaintiff

Q. In other words, the fire of November 29, 1987, happens, you get a call, and sometime between the fire and you actually getting down there in response to the call you are advised that somebody on behalf of Kaiser has done some testing of some sort of the rotor and stator?

A. That's correct.

Q. Were you physically present on December 3, 1987, at approximately 6:30 a.m. when the new rotor/old stator combination was energized and allegedly failed?

A. I was physically as close as me and you to it.

Q. Who physically, if you know, supplied the power to energize the rotor and stator at that time?

A. The plant did.

Q. Do you know specifically who at Kaiser did that?

A. No. You see, what I had to do was, between 5:00 and 6:30 that morning I had to reverse my process of tag-out and go back and pull all of my tags and pull all of my locks, and I was busy doing that for quite some time, because there was a fistful of tags.

Then I had my last high-voltage tag which was left on the breaker, and a maintenance electrician wearing suspenders, and I don't know who he is but he always wears suspenders, asked me for my high-voltage tag. I gave it to him, and then him and some other people disappeared down in the basement to energize the motor. They were at that point ready.

Q. Is it your sense that the motor was energized from in the basement?

A. That is where it's done from, yes.

Q. How is it done? Can it be done a couple of different ways?

A. I didn't see the procedure.

Q. I know you didn't, but I'm saying are there a number of different ways it could be energized from the basement?

A. I believe it has to be done right at the starter.

Q. What does one do? I have no idea.

A. You have control circuits interlocked in your, if you will, pre-start, and if everything is all right, you turn the switch and it starts.

These control circuits are interlocked with the mill as far as -- I would only be guessing. There are safety interlocks to make sure that certain things are shut down while you are starting up.

Q. Do you have any idea, for instance, what position the resistors were in at the time of the start-up?

A. I did not look.

Q. Do you have any idea whether the brushes were seated?

A. They were seated, because we seated them, and I visually checked those, and Dick Wright visually checked those.

Q. When the button is pushed or the switch is flipped in the basement to provide the power to energize the rotor and the stator, how much voltage is that at that time, do you know?

A. Well, it is nominally 13,800.

Q. By nominally, you mean what?

A. Average.

Q. What happened when it was flipped?

A. Well, immediately you could hear the coal saturating. It's just a low hum. It's (indicating a hum), you could hear the coil saturating.

The shaft began rotating, and almost instantaneously I could hear voltage etching. It wasn't instantaneous, but it was almost instantaneous, and the voltage etching was getting louder and louder and

louder. Finally, whether it was fire or whether it was 13,800 volts, I don't know what it was, it was crawling all over the floor, and my brother and I were both standing right within it, and he said, "What are we going to do?" and I said, "Stand still," because it was everywhere, and at that point the starter kicked out the motor.

Q. How long did that whole sequence of events which you have described for me, from when the switch was flipped and the hum begins to when the started kicks off the motor.

A. Four to five seconds.

Q. In your mind and view, had the rotor made a complete revolution?

A. It had made at least one, and then it coasted. You see, the momentum of the flywheel caused it to coast even after the starter kicked it off.

Q. When you say the starter kicked it off, tell me exactly what you mean by the starter kicking the motor off.

A. Well, we heard the voltage disappear. I mean, we knew the starter had tripped out.

MR. GILL: Breaker?

THE WITNESS: The breaker, if you will.

BY MR. GEORGE:

Q. Is that the same as a slip differential fault signal?

A. I don't have any idea whether it is or not.

Q. When you say the starter or breaker, where is that physically located on the machine?

A. It's not; it's in the basement where they went. It was down at the switch station where they went to start the --

Q. Would it be like a fuse box kicking?

A. I would assume it would have the same end results.

Q. The hum that you heard, that's a hum which is customarily heard when the rotor is energized?

A. When any large set of coils is energized, whether it be a motor or a transformer, no matter what it be.

Q. So you hearing that was expected?

A. Yes.

Q. And the way in which you heard it and the way in which it sounded wasn't unusual?

A. Not instantaneously, no.

Q. The first time that you knew that something was wrong was when you heard voltage, you said --

A. Etching or tracing, yes.

Q. Tell me what you mean by that.

A. Well, when you rub your feet on a carpet and you touch somebody, you can heard static. You hear that voltage being discharged. That's what I mean by it.

Q. Do you know what has to happen within the rotor and the stator to be able for someone to hear that etching for that process to occur?

A. I knew there was a failure. Now, at this point I didn't know that the rotor or stator had failed. I thought it was one of our stress cones that had failed, because it would sound the same way and act the same way.

Q. When you said failure, though, you don't know what kind of failure?

A. I just knew there was failure.

Q. A failure?

A. There was a breakdown, yes.

Q. It could have been in one of the terminations?

A. Yes. In fact, we were confident that that is what had happened.

Q. It could have been in the insulation on the coils and the rotor?

A. Correct.

Q. It could have been in the stator?

A. Correct.

Q. It could have been anywhere?

A. It could have been anywhere.

Q. And it lasted for a couple of seconds until the starter or breaker kicks it off?

A. Correct.

Q. And then I'm assuming the flywheel ultimately comes to a stop?

A. Correct.

Q. And the rotor stops turning?

A. Correct.

Q. And the fire that you referred to that was on the floor --

A. Whatever it was.

Q. -- it burned itself out?

A. Well, it retracted, yes.

Q. Did you perceive that to be just an electrical fire caused by this voltage of 13,800 volts getting outside of where it was supposed to be contained?

A. Yes, in fact, we didn't feel that the motor had sustained any damage. We were confident that one of our stress cones had failed, and that's the first place we went to look. Dana and I immediately went down to the basement with a flashlight and looked at our stress cones.

Q. And those specifically are where?

A. Right up under the motor.

Q. Those would be termed the t-leads?

A. Correct.

Q. And what did you see when you looked at those t-leads?

A. They looked fine.

Q. You didn't see any evidence of any damage at all?

A. I didn't see any tracing; I didn't see anything.

Q. What did you do then?

A. Then we went back up to the main floor, 632 --

MR. GILL: Meaning the elevation and not the time, I take it?

THE WITNESS: Yes, and waited for somebody to tell us what they wanted us to do.

BY MR. GEORGE:

MR. GILL: So the west side is at about 3:00 o'clock on the clock as the rotor would have sat in the stator?

THE WITNESS: That's correct.

BY MR. GEORGE:

Q. So your estimate is that from about 3:00 o'clock to about 6:00 o'clock is where there was evidence of some damage to the coils on the rotor?

A. Yes, I could see that much with a flashlight.

Q. Is it just the extended turns of the rotor between 3:00 and 6:00 o'clock which were damaged or all of the coils in between there?

A. No, there were only given windings that were damaged, and I don't know which ones. I didn't stop to count to see, but they weren't actually the end turns. They were actually the solder joint back inside the end turn that was damaged. The turns themselves,

if you look -- Well, it's kind of hard to see. We're not close enough right here (indicating).

See, you've actually got -- that one (indicating) is completely disintegrated. Could I use a piece of paper to show you?

Q. Sure.

A. You've actually got where your winding comes around the rotor, and this is your winding (indicating). A solder joint back in here (indicating), that was the point of disintegration on every one of these.

MR. GILL: On the full number of turns that showed damage, it was the solder point that was the point of disintegration?

THE WITNESS: Yes. For instance, let's say this was the one that we're looking at here that is completely disintegrated (indicating). Then you come down here a few degrees, and there was another one

destroyed, and you come down here a few degrees (indicating), and there was another one destroyed.

BY MR. GEORGE:

Q. Is it fair to say that in between the solder joints on those turns which you saw destroyed there were also coils which appeared to be fine and which weren't damaged?

A. Outside of smoke.

trace, and sometimes you can hear it.

Q. But it won't destroy the integrity?

A. No.

Q. It will just detect a lack of integrity?

A. Correct.

Q. Even if there is a weakness?

A. Correct. Am I correct? That's why high pot was designed.

Q. Well, he really can't respond on the record. You guys can discuss it off.

A. Okay, I see.

Q. With regard to the fire that you noticed --

A. The first time or the first failure?

Q. Along the floor on the December 3 failure.

A. Okay, all right.

Q. Was that fire on the steel bed plate covers?

A. No, it was just -- Whether it was fire or whether it was voltage or what it was, I can't say. It was white in description, but it wasn't taking any pattern. It wasn't going to the sole plate; it wasn't staying on the sole plate; it was out on the concrete, and it was just everywhere.

Q. So it was both on the concrete and on the sole plate?

A. Yes.

Q. And it was everywhere around there?

A. It may have been flames. I don't know what it was.

Q. Whatever it was, whether it was fire or arcing, electricity sparking, whatever it was, it was everywhere?

A. Yes.

Q. Both on the concrete, on the steel bed plates, all over the floor area?

A. Correct.

Q. How long did it last?

A. A second, two seconds, three seconds, I don't know.

Q. Did you notice it before the machine kicked off?

A. Yes, that is when we observed it, after it started rotating, after I could hear etching and prior to the breaker tripping.

Q. When the breaker tripped, did it stop?

A. Yes.

Q. Did you ever see where that flame or whatever it was first started or where it came from or where you noticed it first?

A. I was more concerned with keeping my feet out of it. I really didn't look to see what it was or where it was coming from.

Q. So you don't have any recollection as you sit here as to what part of the rotor or stator or controls or anything else you first remember it coming from?

A. No. It was coming from inside the covers, but I don't know what, and knowing what I know about electricity, I don't understand how it did it. I just don't understand what it was or why it did it.

Q. Tell me what you mean by that.

A. It was just a phenomenon that was uncharacteristic to electrical theory.

Q. Does that lead you to believe that perhaps it wasn't electricity?

A. Well, that's why I said it could have been flames, or it could have been electric. I don't know what it was. It was white.

Q. Tell me why it is you don't feel it acted like electricity or how you would have expected electricity to act.

A. Because it was on the concrete, because it even made it out of the covers.

Q. You would not have expected electricity and the failure of the insulation integrity of the windings to do that?

A. I wouldn't compare one to the other. I wouldn't expect electricity to make it past metal.

Q. And this definitely did?

A. Yes.

MR. GILL: If it were.

THE WITNESS: Yes, if it was.

BY MR. GEORGE:

Q. No, whatever it was. When I say this, I mean whatever it was. This definitely made it past metal?

A. Yes.

Q. Before you saw the fire or whatever it is, did you ever see any sparks of any kind?

A. No.

Q. When you say you heard arcing, does arcing mean that there is sparking going on?

A. I heard what I would term etching or tracing, which is not arcing. It is the escape of voltage from an insulated areas to a non-insulated area, and that is not necessarily an arc although you may term it such, but it is voltage tracing.

Q. As you have defined it then, did you ever see or hear arcing?

A. As the unit progressed and the tracing got worse, it was obvious that something was arcing them, and that's why I thought it was termination.

Q. Could you tell me where that arcing as coming?

A. No. you could just hear it inside the unit. You couldn't tell.

Q. Physically, where were you standing in relation to the unit when this all happened?

A. Within about two and one-half feet of it and on the southwest side of the motor.

Q. Closest to what part of the motor?

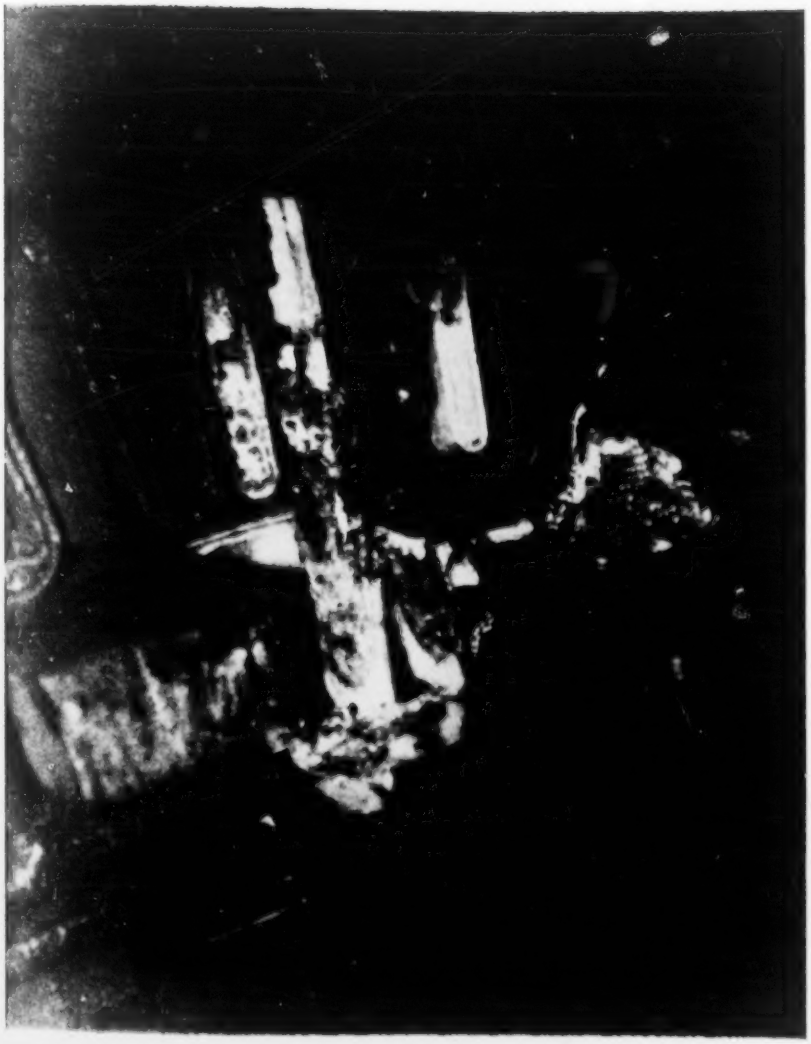
A. The stator on the southwest corner.

Q. Can you tell from where you heard the etching or the tracing and then the arcing coming from as to what portion of the M.G. set it came from, whether it was motor, rotor, stator or something else?

A. It was obviously coming from the motor, but I couldn't tell where in the motor. When the coverage are placed on it and the fans are turned on, there is such a force of air that most sound is muffled and it's hard to tell.

Q. Can you think of anything else that occurred in that five-second span from when it was energized and you saw all of the things that you have

described for us that might indicate for us specifically what happened, where it happened, et cetera?



K87-0133

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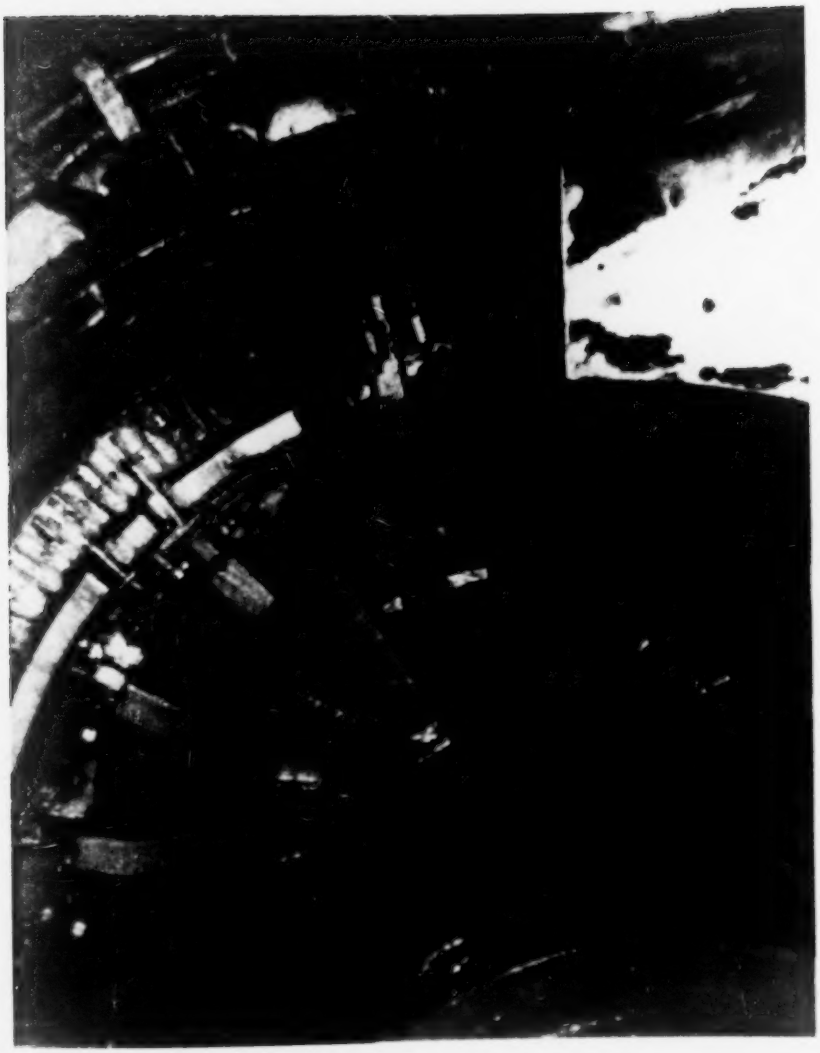

K87-0135

SUMMARY OF REPAIR COSTS

Kaiser Aluminum - Ravenswood, West Virginia
Loss - November 29, 1987

Vendor	Purchase Order	As Claimed	Property Damage re: 12/3/87 failure Per Adjuster Property Damages	Expediting Expenses
Smith	971116	$102,245	$102,245	
Smith	971116	73,004	73,004	
Smith	910994	75,512		$ 75,512
Eastern	910996	34,782		34,782
Eastern	910979	27,312	13,656	13,656
Eastern	910979	3,035	1,518	1,517
Graybar	969727	2,010	2,010	
Graybar	969727	367	367	
KACC	11/87 CAM Lbr	938	469	469
KACC	12/87 CMS Lbr	1,524	762	762
KACC	12/87 CMS Material	2,883	1,442	1,441
KACC	1/88 CMS Material	21	11	10
	Total	$320,633	195,484	$125,149
Less: Depreciation on Rotor ($192,000 x 15%)			28,920	
Fixed Fringe Benefits in KACC Labor (41,231 x 17%)			209	
Net Property Damage			$166,355	

Supreme Court, U.S.
FILED
APR 15 1993
OFFICE OF THE CLERK

No. 92-1503

In The

Supreme Court of the United States

October Term, 1992

KAISER ALUMINUM AND CHEMICAL CORPORATION, a Delaware Corporation,

Petitioner,

vs.

WESTINGHOUSE ELECTRIC CORPORATION, a Pennsylvania Corporation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

SHAWN P. GEORGE
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950 One Valley Square
Charleston, WV 25301
(304) 343-5555

Counsel for Respondent

April 15, 1993

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

1. Whether this Court should review the Fourth Circuit Court of Appeal's decision that Kaiser's Complaint, which sought only economic damages for alleged tortious conduct, failed to state a claim under West Virginia law under the facts of record?

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No. 92-1503

In The

Supreme Court of the United States

October Term, 1992

KAISER ALUMINUM AND CHEMICAL CORPORATION, a Delaware Corporation,

Petitioner,

vs.

WESTINGHOUSE ELECTRIC CORPORATION, a Pennsylvania Corporation,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Westinghouse Electric Corporation, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Fourth Circuit's decision in this case, which is reported at 981 F.2d 136 (4th Cir. 1992).

STATEMENT OF THE CASE

On March 1, 1993, Kaiser Aluminum and Chemical Corporation ("Kaiser") filed its petition for writ of

certiorari seeking review and reversal of a Final Order of the Fourth Circuit Court of Appeals entered December 2, 1992 in favor of Westinghouse Electric Corporation ("Westinghouse"). Kaiser argues that both the Fourth Circuit and the district court misconstrued Kaiser's Complaint as one in strict liability, not in negligent repair. This assertion is without merit and misstates what transpired. Neither the Fourth Circuit nor the district court held that West Virginia did not recognize a cause of action for negligent repair. Instead, they opined that under the facts of this case, Kaiser's Complaint did not state a cause of action under West Virginia law and the additional materials Kaiser subsequently submitted did not satisfy the requisite standard of proof. A review of the relevant facts and law demonstrates both courts were correct.

On November 17, 1988, Kaiser, for itself and Trochus Insurance Company, its insurer, who retains a majority subrogated interest, instituted this action against Westinghouse. Kaiser sought recovery under tort law for certain alleged repair expenses and "business interruption losses" resulting from an electrical failure in a motor generator set ("M.G. set") in its aluminum mill in Ravenswood, West Virginia, on December 3, 1987 (Complaint, Petitioner's Appendix D, Tab 2).

Westinghouse filed a timely motion to dismiss ("Motion") contending that: 1) Kaiser's alleged damages were solely economic losses which were not recoverable in tort under West Virginia law; and 2) the applicable statutes of limitations barred any contract action. (Motion, Respondent's Appendix A.) Kaiser responded that West Virginia law allowed recovery of economic losses in a tort action when the plaintiff's damages

resulted from a "sudden, calamitous event" and relied on the opinions in *Star Furniture Co. v. Pulaski Furniture Co.*, 297 S.E.2d 854, 859 (W.Va. 1982) and *Roxalana Hills, Ltd. v. Masonite Corp.*, 627 F.Supp. 1194 (S.D.W.Va 1986), *aff'd*, 813 F.2d 1228 (4th Cir. 1987). At no time prior to the district court's ruling on the Motion did Kaiser dispute that it was required to meet the test set forth in *Star Furniture* and *Roxalana Hills*.

Chief Judge Haden was the district judge assigned to this case and the *Roxalana Hills* case. On October 12, 1989, Chief Judge Haden granted Westinghouse's Motion holding that the Complaint failed to meet the requirements of *Star Furniture* or *Roxalana Hills*. (District court Opinion, Petitioner's Appendix A, Tab 1.)

Kaiser then moved for reconsideration of the district court's Order pursuant to Federal Rules of Civil Procedure 52(b) and 59(e). Kaiser argued *for the first time* that the test set out in *Star Furniture*, regarding strict liability actions and applied to negligence actions as well in *Roxalana Hills*, was not applicable to Kaiser's negligent repair claim. (Motion to Vacate or Amend, Petitioner's Appendix D, Tab 1.) Kaiser submitted excerpts it claimed were sufficient to meet the requirements of *Star Furniture*. (Motion to Vacate or Amend, Petitioner's Appendix D, Tabs 3-8.) At no time did Kaiser move to amend its Complaint.

Chief Judge Haden considered Kaiser's shift in position and supplemental materials and denied Kaiser's motions. (District court Order, Petitioner's Appendix A, Tab 2.) On November 20, 1990, Kaiser appealed the district court's decision to the Fourth Circuit Court of

Appeals. On December 2, 1992, a three-judge division of the Fourth Circuit affirmed the ruling of the district court. (Circuit Court Decision, Petitioner's Appendix A, Tab 3.) Kaiser then filed a motion for rehearing *en banc* which was denied on January 7, 1993. (Circuit Court Order, Petitioner's Appendix C.) Pursuant to § 28 U.S.C. 1254(1) (1966), Kaiser now seeks certiorari review.

RELEVANT FACTS

This is a diversity action involving the manufacture, sale and repair of an industrial product between two large sophisticated entities, Westinghouse as manufacturer/vendor and Kaiser, as end-user/purchaser. In 1976, Kaiser ordered and purchased from Westinghouse a motor generator stator ("new stator") and rotor ("new rotor") for use as replacement parts for its 168 inch aluminum mill at Ravenswood, West Virginia. Westinghouse manufactured the new stator and new rotor and delivered them to the Kaiser Aluminum facility at Ravenswood in February of 1979. (Complaint ¶¶ 8 and 9, Petitioner's Appendix D, Tab 2.) Westinghouse warranted that the new stator and new rotor would be free from defects in workmanship and materials for one year after the date of initial operation, not to exceed 18 months after shipment.

Kaiser did not place either component into the aluminum mill upon receipt, but instead placed both into storage where they stayed for 27 months until April 20, 1981. (Petitioner's Brief at 7.) On April 26, 1981, Kaiser installed the new stator and new rotor. (*Id.*) On April 27,

1981, while shutting down the M.G. set for other reasons, Kaiser personnel noticed the new rotor was rubbing on the end-bell housing of the new stator. (Petitioner's Brief at 7.) Ultimately, Kaiser determined that the core of the new rotor had slipped on the shaft, which necessitated mechanical repairs. (*Id.*) Although the warranty on the new rotor had expired, Westinghouse agreed to perform mechanical repairs on the new rotor at its Round Rock, Texas, facility at no cost to Kaiser. Westinghouse performed the repairs in May of 1981 and returned the new rotor to Kaiser in early June of 1981. (Petitioner's Brief at 8.) Again, Kaiser did not place the new rotor into the M.G. set, but instead returned it to storage for another six and a half years, until November 29, 1987, when a fire in the M.G. set destroyed the original rotor. (Petitioner's Brief at 9.)

On December 3, 1987, Kaiser installed the new rotor which failed electrically when energized. (*Id.*) Kaiser claims the failure left the mill inoperable for approximately ten days. (*Id.*). This suit followed. Essentially, Kaiser alleges that Westinghouse's negligent repairs of the new rotor in May of 1981, caused the electrical failure in December, 1987. The Complaint did not contain any contract-based causes of action. Kaiser did not and could not allege that the electrical failure caused any personal injury or physical damage to any part of the mill or M.G. set other than to a portion of the new rotor.

REASONS FOR DENYING THE WRIT

I. THE PETITION FAILS TO MEET ANY OF THE CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI

Rule 10 of the Rules of the Supreme Court of the United States sets forth the considerations governing jurisdiction of a Writ of Certiorari. The Rule provides that review is not a matter of right, but will be granted by judicial discretion only when there are "special and important reasons therefor." Rule 10(a) lists three considerations which, while neither controlling nor all inclusive, are weighed by the Court in deciding whether to grant a writ from a federal appellate court. They are:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

* * *

Kaiser alleges the district court's grant and the Fourth Circuit's affirmance of Westinghouse's Motion is such a departure from the law of West Virginia and the rulings of this Court to require review and reversal. This contention is baseless and without merit. Kaiser's Petition does not meet any of these criteria because: 1) there is no conflict between the circuits; 2) there is no federal

question involved; and 3) there is no substantial departure from the accepted and usual course of judicial proceedings. This action involves only the routine interpretation of West Virginia law concerning the sale and repair of a product. District courts and courts of appeal all over this country conduct similar tasks daily in diversity matters. While this Court does not often state the reason why writs of certiorari are granted or denied, counsel for Westinghouse could not find a case where this Court granted a writ of certiorari on the same grounds asserted by Kaiser.

Further, this Court disfavors reviewing lower court decisions which turn solely upon an analysis of the particular facts involved. See *Texas v. Mead*, 465 U.S. 1041 (1984) and *United States v. Johnston*, 268 U.S. 220, 227 (1925); ("We do not grant a certiorari to review evidence and discuss specific facts.") Moreover, where two courts have agreed upon the facts and their significance, this Court will not review the matter "in the absence of a very obvious and exceptional show of error." *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271 (1949). No such error exists here and certiorari is not warranted.

II. THE FOURTH CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S DISMISSAL OF KAISER'S COMPLAINT BECAUSE IT FAILS TO STATE A CLAIM UNDER WEST VIRGINIA LAW.

A. West Virginia Law Does Not Support Kaiser's Tort Claim For Solely Economic Losses.

The Petition seeks this Court's review of an alleged tort claim under West Virginia law. West Virginia law is

clear – purely economic losses are recoverable only in contract, not in tort. As the West Virginia Supreme Court has noted:

> . . . *a party who suffers mere economic loss* as a result of a defective product must turn to the Uniform Commercial Code to seek relief.

Basham v. General Shale, 377 S.E.2d 830 (W.Va. 1989) (emphasis added). This holding, first enunciated in *Star Furniture*, has been consistently followed by courts applying West Virginia law, *see, e.g., Capitol Fuels, Inc. v. Clark Equipment Co.*, 382 S.E.2d 311 (W.Va. 1989); *Roxalana Hills*, 627 F.Supp. at 1196, and is in accord with the overwhelming weight of authority. *See Jones and Laughlin Steel Corporation v. Johns-Manville Sales Corporation*, 626 F.2d 280, 284 (3rd Cir. 1980); *Purvis v. Consolidated Energy Products*, 674 F.2d 217, 222-224 (4th Cir. 1982); *Hart Engineering Company v. FMC Corporation*, 593 F.Supp. 1471 (D.R.I. 1984). No West Virginia case involving a product since *Star Furniture* has held otherwise.

The reasons behind this rule are sound. As the court noted in *Roxalana Hills*, disallowing a cause of action for economic losses in tort maintains the proper relationship between the law of torts and the contract law principles set forth in the Uniform Commercial Code. (*Id.*) at 1196. Tort theories are intended to protect consumers from products which are not reasonably safe, not from those products which are merely ineffective. (*Id.*) The proper relationship between tort law and the Uniform Commercial Code requires that claims for economic damages based upon unfulfilled expectations must be pursued under a warranty or contract theory. *Star Furniture*, at 859 and *Roxalana Hills*, at 1196.

The focus of the Petition is the alleged erroneous characterization by the Fourth Circuit (twice), the district court (twice) and Westinghouse (continuously) of Kaiser's cause of action. Kaiser argues this is not a strict liability tort suit, but rather a negligent repair suit to which different law and standards apply. (Petition at 13, 20-23.) This argument is disingenuous and in direct conflict with Kaiser's evidence and actions below.

First, all parties, including Kaiser, initially agreed this action was governed by the law set forth in *Star Furniture* and *Roxalana Hills*. Specifically, Kaiser cited *Star Furniture* in its Response to Westinghouse's Motion and stated: "West Virginia law does distinguish between tort and contract claims when damages occur to the defective product itself. However, West Virginia tort law does provide a remedy when a sudden, calamitous event causes physical damage to the product." The Response then spent four pages arguing how and why Kaiser's Complaint met the *Star Furniture* test.

Further, Kaiser also initially conceded that under the holding in *Roxalana Hills v. Masonite Corp.*, 627 F.Supp. 1194 (S.D. W.Va), aff'd. 813 F.2d 1228 (4th Cir. 1987) " . . . the West Virginia Supreme Court of Appeals would analyze *negligence* claims involving damage to products by the same test articulated in *Star Furniture* for strict liability claims.

Relying upon Kaiser's arguments at that time, the district court properly summarized Kaiser's position as follows:

> Perhaps recognizing that it can recover, if at all, in tort only under the principles set forth in

> *Star Furniture*, Kaiser's position is stated as follows: As a result of Westinghouse's negligent repair, the rotor/shaft component "suffered a sudden, immediate and massive electrical failure" when energized which resulted in physical damage to the rotor itself and the motor-generator set and in loss of profits during the period of time the hot mill was not operational, Plaintiff's memorandum at 4. The Plaintiff has not alleged, however, that the electrical failure was attributable to any inherently dangerous defect or design of the rotor/shaft component.

(District court Order Petitioner's Appendix A, Tab 1, pg. 4.) Based on this deficiency, the district court granted Westinghouse's Motion.

Kaiser then filed a Motion to Vacate or Amend Judgment Order. (Petitioner's Appendix D, Tab 1.) It was at this time and only after the district court granted Westinghouse's Motion that Kaiser argued *for the first time that Star Furniture did not apply and that negligence actions should be viewed differently than strict liability actions*. Neither the district court nor the Fourth Circuit were misled by this sleight of hand. This Court should not be misled by Kaiser's change of position either. Under West Virginia law, only a contract action provides a remedy for economic losses including lost profits for damage to a product. However, Kaiser conceded that any contract claim which it may have had is barred by the statute of limitations. West Virginia Code § 46-2-725 (1966). (Respondent's Appendix B.)

Kaiser then attempted to argue that this is simply a negligent repair case for which lost profits may be recovered. This is folly. First, the cases Kaiser cited below

support Westinghouse's position because they sound in contract for breach of warranty, not in negligent repair. *See Skeen v. C & G Corp.*, 185 S.E.2d 493 (W.Va. 1971) and *Elsey Ford Sales, Inc. v. Solomon*, 280 S.E.2d 718 (W.Va. 1981). Second, there is no authority that lost profits may be recovered in any context remotely similar to this action. Third, as the Fourth Circuit succinctly pointed out in its Opinion:

> The suit here arises from a sale to a customer-purchaser by a manufacturer of an article to be manufactured pursuant to certain requirements. Such a product not infrequently has breakdowns in the early period of use. The manufacturer in such a case must make repairs or corrections in the product in conformity with its implied warranty of merchantability and of good workmanship. These repairs or corrections are not separate from the sale of the article, they are merely steps taken to conform the product to the expected performance requirements of the product purchased. As such, they are an integral part of the manufacturer's bargained-for performance of supplying a sound product per the purchase agreement. And this is why Westinghouse made no charge and filed no bill for the repairs and corrections made in 1981 and why Kaiser paid nothing for such repairs. Moreover, Kaiser's cause of action depends ultimately on establishing that the product, either from date of delivery or from the date of the correction in 1981, was a "defective product" to which was to be attributed the "event" in 1988. Thus, Kaiser's case is one which presents all the necessary elements of a products liability case.

(Circuit Court Decision, Petitioner's Appendix A, Tab 3, pg. 9.)

Moreover, even if the Fourth Circuit treated Kaiser's Complaint only as a negligence action rather than as a strict liability action, lost profits could not be recovered. For as Kaiser initially conceded, West Virginia law in negligence cases involving a product is the same as strict liability cases for purposes of analyzing liability and damages. Specifically, under *Roxalana Hills*, "West Virginia would *not* find a negligence cause of action in a breach of contract case. . . . *The Court concludes the same bargain and expectation interests apply to negligent breaches of contract*" (emphasis added) *Roxalana Hills*, at 1198. The West Virginia Supreme Court of Appeals has on at least two occasions cited *Roxalana Hills* with approval. *See, Capitol Fuels, Inc. v. Clark Equipment Co.*, 382 S.E.2d 311 (W.Va. 1989) and *Basham v. General Shale*, 377 S.E.2d 830 (W.Va. 1988).

Further, the Fourth Circuit correctly noted by reference to the Third Circuit case of *Jones & Laughlin Steel v. Johns-Manville Sales*, 626 F.2d 280 (3rd Cir. 1980) that:

> "Economic loss[es]" are "damages for inadequate value, costs of repair and replacement of the defective product or consequent loss of profits without any claim of personal injury or damage to other property . . . The line of demarcation between physical harm and economic loss . . . reflects the line of demarcation between tort theory and contract theory." *Jones & Laughlin Steel v. Johns-Manville Sales*, 626 F.2d 280 (3rd Cir. 1980) (citation omitted).

(Footnote 2 of Circuit Court Decision, Petitioner's Appendix A, Tab 3, pg. 5.) *Star Furniture, Roxalana Hills, Capitol Fuels* and *Basham* are all in accord.

Finally, at *no time* did the district court or the Fourth Circuit opine that West Virginia did not recognize a tort action for negligent repair. Rather, each court consistently found that based on the facts of this case and the relief sought, Kaiser's Complaint must be dismissed because it was barred by the contract statute of limitations and Kaiser could not meet the tort standard of proof.

B. The Court Correctly Analyzed The Supplemental Materials Supplied By Kaiser In Support Of Its Motion To Vacate Or Amend Judgment Order.

The Fourth Circuit properly noted that affidavits and exhibits not before the lower court in making its decision are not to be considered on appeal. *Gilson v. Republic of Ireland*, 787 F.2d 655, 659 (D.C. Cir. 1986); *United States v. Drefke*, 707 F.2d 978, 983 (8th Cir.), cert. denied, 464 U.S. 942 (1983); *Munoz v. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators*, 563 F.2d 205, 209 (5th Cir. 1977). (Circuit Court Decision, Petitioner's Appendix A, Tab 3, pg. 6.)

However, while not required to do so, the Fourth Circuit conducted an extensive review of the supplemental materials supplied by Kaiser. This, in effect, transformed Westinghouse's Motion to one under Rule 56. The court concluded that: 1) Kaiser's submission conceded strict liability principles applied; 2) no defect existed; and 3) no sudden, calamitous event had occurred. (Circuit

Court Decision, Petitioner's Appendix A, Tab 3, pgs. 17-19.) On this last point, the Fourth Circuit correctly noted that the total event lasted 2-3 seconds and only a small amount of electricity escaped. Further, no one was injured or in danger of injury. The event was not unusual or unexpected and the M.G. set shut itself down as designed immediately when the failure occurred. Finally, only a small portion of the rotor was damaged and no other property was affected.

Kaiser's suggestion that the material was filed to preempt a summary judgment motion is hollow, especially when one considers that Kaiser filed these materials *after* the District Court had granted Westinghouse's Motion to Dismiss. Further, Kaiser's delay in presenting these materials is unexplained and without justification. Finally, the materials had relevance, if at all, only in a strict liability context to attempt to prove: 1) the product was not reasonably safe for its intended use; and 2) that the damage resulted from a sudden, calamitous event. Simply stated, these materials confirm that Kaiser sought and failed to satisfy the requirements of *Star Furniture* and its progeny.

Finally, dismissal was also appropriate because Kaiser's negligence claims are barred by the applicable negligence statute of limitations. West Virginia Code § 55-2-12(a) (1981 Repl. Vol.) provides for a two year statute of limitations for all negligence actions for damage to property. (Respondent's Appendix C.) The repair of which Kaiser complains occurred in late April and early May of 1981. This is the last time Westinghouse saw or had anything to do with the product. Kaiser filed its lawsuit in November of 1989, 8½ years after the repair

and 6½ years after the negligence statute of limitations expired. Westinghouse raised in its Answer to the Complaint, as a separate defense, all statutes of limitations. Thus, under every reasonable analysis, Kaiser's Complaint fails and was properly dismissed. (Answer, Respondent's Appendix D, App. 14, "THIRD DEFENSE.")

C. The Fourth Circuit's Affirmance Of The Dismissal Is Not Violative Of This Court's Rulings Regarding Rules 12(b)(6) Or 8.

Kaiser alleges that the Fourth Circuit's decision to affirm the dismissal of this action is contrary to this Court's cases which hold that Complaints should not be dismissed for failure to state a claim upon which relief can be granted unless it appears that no set of facts in support of the claim would entitle the claimant to the relief sought. *Scheuer v. Rhodes*, 94 S.Ct. 1683, *Conely v. Gibson*, 78 S.Ct. 99 (1957), *Hishon v. King & Spalding*, 104 S.Ct. 2229 (1984) and *McLain v. Real Estate Bd., Inc.*, 100 S.Ct. 502 (1980).

Review of the record does not support this claim. The Fourth Circuit's opinion is extensive and exhaustive, comprising over twenty (20) pages. The Court conducted a *de novo* review of the evidence and concluded the district court was correct. The Fourth Circuit was called upon to address an issue of West Virginia tort law, one that West Virginia courts have previously addressed. It's only because Kaiser is unhappy with the Fourth Circuit's answer that Kaiser seeks to argue that the court misunderstood Kaiser's question. This Court should not be

misled or used as a forum to review routine state law tort and breach of contract claims. Both the district court and the Fourth Circuit are empowered to address these issues and did so correctly. To suggest otherwise would emasculate Rules 12(b) 6 and 8.

Additionally, there is ample support for the district court's refusal to vacate its Order dismissing the case and the Fourth Circuit's affirmance. Fourth Circuit case law holds that absent a "miscarriage of justice", a party cannot urge "new theories" for the first time on appeal. *Karpa v. Commissioner*, 909 F.2d 784, 788-89 (4th Cir. 1990); *National Wildlife Fed'n v. Hanson*, 859 F.2d 313, 318 (4th Cir. 1988). Moreover, courts of appeals cannot apply different theories than those advanced below. *See Richardson v. Turner*, 716 F.2d 1059, 1061 n.2 (4th Cir. 1983) (court of appeals should not decide case on legal theory contrary to one advanced below); *United Virginia Bank v. B.F. Saul Real Estate Trust*, 641 F.2d 185, 189 (4th Cir. 1981) (court of appeals would not allow parties to "pla[y] fast and loose" or "blo[w] hot and cold" by changing positions on appeal).

West Virginia law does not recognize or support the distinction Kaiser seeks to make. This is a breach of contract action arising out of the sale and repair of a product. West Virginia law does not recognize tort recovery of economic losses absent a sudden, calamitous event. Both the district court and Fourth Circuit properly found no sudden, calamitous event occurred and dismissed the Complaint.

D. The Fourth Circuit's Affirmance Did Not Violate Kaiser's First Amendment Rights.

Kaiser alleges that the Fourth Circuit's affirmance of the district court's dismissal violates Kaiser's First Amendment right to petition for redress. While citing no authority remotely analogous to this case, Kaiser argues that the courts below changed the nature and scope of Kaiser's Complaint and failed to permit Kaiser to pursue its stated cause of action. Nothing could be further from the truth. First, Kaiser has had *every* opportunity conceivable to state a viable cause of action under West Virginia law *given the facts of this case, but failed to do so.* This Court should not be confused: Neither the district court nor the Fourth Circuit ever ruled that West Virginia does not recognize a cause of action for negligent repair. To the contrary, both tribunals recognized the cause of action. However, under the facts of this case, both concluded that Kaiser's Complaint and evidence demonstrated only a breach of contract claim, which was barred by the applicable statute of limitation. Kaiser did not and could not demonstrate a tort claim arising from a sudden, calamitous event. Further, even after the district court dismissed Kaiser's Complaint, Kaiser never moved in district court to file an amended Complaint. The appropriate result of these failures under West Virginia law is dismissal. Accordingly, Kaiser has not been denied any First Amendment or other constitutional right.

CONCLUSION

Kaiser has tried four (4) times unsuccessfully to convince a Court that its alleged negligent repair claim is viable under West Virginia law where it suffered only economic losses and no sudden, calamitous event occurred. The district court and the Fourth Circuit correctly applied the facts in this case to existing West Virginia law and concluded Westinghouse's Motion to Dismiss was proper. This Court should so find.

Respectfully submitted,

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950 One Valley Square
Charleston, West Virginia 25301

Counsel for Respondent

April 15, 1993

APPENDIX

APPENDIX A:

DEFENDANT WESTINGHOUSE ELECTRIC CORPORATION'S MOTION TO DISMISS AND MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS.....App. 1

APPENDIX B:

WEST VIRGINIA CODE § 46-2-725 (1966).....App. 10

APPENDIX C:

WEST VIRGINIA CODE § 55-2-12a 1981 REPLACEMENT VOLUME.....App. 11

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

AT PARKERSBURG

KAISER ALUMINUM & CHEMICAL CORPORATION, a Delaware corporation,

Plaintiff,

v. CIVIL ACTION NO. A:88-15112

WESTINGHOUSE ELECTRIC CORPORATION, A Pennsylvania corporation,

Defendant

DEFENDANT WESTINGHOUSE ELECTRIC CORPORATION'S MOTION TO DISMISS

Pursuant to Federal Rule of Civil Procedure 12(b)(6) and this Court's Time frame Order of January 20, 1989, defendant Westinghouse Electric Corporation ("Westinghouse"), by its counsel, Shawn P. George and Robert L. Stewart, Jr., moves the court for an Order dismissing the Complaint for failure to state a claim upon which relief can be granted. This motion is made on the following grounds:

1. Plaintiff's claim for cost of repairs, and "business interruption losses" is solely for economic losses, and is based solely on a theory of "negligent repair";

2. There is no tort cause of action for the recovery of economic losses under the law of the State of West Virginia; and

3. Plaintiff's Complaint is barred by the applicable statute of limitations.

WHEREFORE, Westinghouse demands that the Court dismiss the Complaint with prejudice and grant Westinghouse its costs and attorney's fees incurred.

WESTINGHOUSE ELECTRIC CORPORATION,

By Counsel

/s/ Shawn P. George
ROBERT L. STEWART, JR.
JACKSON & KELLY
1600 Laidley Tower
P.O. Box 553
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

AT PARKERSBURG

KAISER ALUMINUM & CHEMICAL CORPORATION, a Delaware corporation,

Plaintiff,

v. CIVIL ACTION NO. A:88-1512

WESTINGHOUSE ELECTRIC CORPORATION, a Pennsylvania corporation,

Defendant

DEFENDANT WESTINGHOUSE ELECTRIC CORPORATION'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS

I. INTRODUCTION

In 1976, Kaiser Aluminum and Chemical Corporation ("Kaiser") ordered and purchased from Westinghouse Electric Corporation ("Westinghouse") a motor generator stator component ("new stator") and a motor generator rotor component ("new rotor") for use in its aluminum mill at Ravenswood, West Virginia. Westinghouse manufactured the new stator and new rotor and delivered them to the Kaiser Aluminum facility at Ravenswood in February of 1979. Westinghouse warranted that the new stator and rotor would be free from defects in workmanship or materials for one year after date of initial operation, not to exceed 18 months after shipment.

Kaiser placed the new stator and new rotor into storage until April 20, 1981. On April 26, 1981, Kaiser installed the new stator and new rotor in the motor generator set ("M.G. set") of Kaiser's 168 inch hot mill. On April 27, 1981, while shutting down the M.G. set for other reasons, Kaiser noticed a rubbing of the new rotor on an end-bell housing of the new stator. Ultimately, Kaiser determined that the core of the new rotor had slipped on the shaft, which necessitated mechanical repairs. Westinghouse agreed to repair the new rotor at its Round Rock, Texas, facility, which repairs Westinghouse performed in May of 1981. Thereafter, Westinghouse returned the new rotor to Kaiser. Kaiser placed the new rotor into storage for six and a half years, until November 29, 1987, when a fire in the M.G. set destroyed

the original rotor. From April 27, 1981, until November 29, 1987, Kaiser operated the M.G. set with the original rotor and new stator.

On December 3, 1987, Kaiser alleges it placed the new rotor and original stator into the M.G. set, which failed immediately when energized. Kaiser claims that this electrical failure of the new rotor left the mill inoperable for approximately ten days.

Kaiser instituted this action on November 17, 1988, and alleged that Westinghouse's negligent repairs of the new rotor in May of 1981, caused the electrical failure in December, 1987. Kaiser claims it incurred repairs expenses, and "business interruption losses" in excess of one million dollars as a result of the failure. Kaiser does not allege that the electrical failure caused any physical damage to any part of the mill or M.G. set other than the new rotor and new stator.

This memorandum will establish conclusively that the damages which Kaiser seeks are all "economic losses", which are not recoverable in a tort action under West Virginia law. Accordingly, the Compliant, which is based solely upon a theory of negligent repair, must therefore be dismissed. Alternatively, the Complaint is also barred by the applicable statute of limitations, W. Va. Code § 46-2-725 (1964).

II. ARGUMENT

A. West Virginia law does not permit the recovery of economic losses in a tort cause of action.

The only damages Kaiser seeks for Westinghouse's alleged negligent repair of the new rotor are the cost of repair of the rotor, and "business interruption losses" alleged to have been caused by the loss of the use of the rotor. These alleged damages are all economic losses. *Star Furniture Company v. Pulaski Furniture Company,* 297 S.E.2d 854, 857 (W. Va. 1982); *Jones and Laughlin Steel Corporation v. Johns-Manville Sales Corporation,* 626 F.2d 280, 284 (3rd Cir. 1980). The overwhelming weight of authority holds that economic losses are not recoverable in tort. *See, e.g., Star Furniture, supra* at 859; *Jones and Laughlin, supra,* at 287; *Purvis v. Consolidated Energy Products,* 674 F.2d 217, 222-223 (4th Cir. 1982); *Roxalana Hills, Ltd., v. Masonite Corporation,* 627 F.Supp. 1194 (S.D.W. Va. 1986). [sic] *aff'd* 813 F.2d 1228 (1987); *Hart Engineering Company v. FMC Corporation,* 593 F.Supp. 1471 (D.R.I. 1984).

As Stated by the 3rd Circuit:

> . . . where there is no accident, and no physical damage, and the only loss is a pecuniary one, through loss of the value or use of the things sold, or the cost of repairing it, the courts have adhered to the rule . . . that purely economic interests are not entitled to protection against mere negligence, and so have denied the recovery.

Jones and Laughlin, supra, at 287 (quoting W. Prosser, Law of Torts §101).

As this Court has recently held in *Roxalana Hills, supra,* disallowing a cause of action for economic losses in tort maintains the proper relationship between tort law and contract law, as set forth in the Uniform Commercial Code. Tort theories, such as strict liability and negligence, are intended to protect consumers from products which are unreasonably unsafe, not from those products which are merely ineffective. *Roxalana Hills, supra,* at 1196. The proper relationship between tort law and the Uniform Commercial Code requires that loss profit claims, such as Kaiser's, be pursued under a warranty of contract theory. *Star Furniture Company, supra,* at 859; *Roxalana Hills, supra,* at 1196.

The foregoing cases make it clear that there can be no cause of action for economic losses based on an allegation of negligent repairs. In fact, in *Jones and Laughlin, supra,* plaintiff sought, *inter alia,* to recover the costs of repairs to a roof which had been sold by the defendant Johns-Manville to the plaintiff, under a theory of negligent performance of an undertaking to render services. The Third Circuit in *Jones and Laughlin* disallowed all of the plaintiff's tort theories, including the negligent repair theory, reasoning that:

> Disallowance of tort claims for economic losses accords with the provision of the Restatement (Second) of Torts that discuss a manufacturer's liability for negligence and for strict liability. Section 323 of the Restatement (Second) for example, which defines the liability of one who negligently performs an undertaking to render services, provides that a manufacturer is liable to persons using its products for physical harm caused by its negligence. Neither the rule

> nor its accompanying commentary and illustrations extends liability for negligence to encompass economic losses.

Jones and Laughlin Steel, 626 F.2d at 287-288, quoted by this Court in *Roxalana Hills*, 627 F. Supp. at 1198. See also, *Long v. Jim Letts Oldsmobile, Inc.*, 135 Ga. App. 293, 217 S.E.2d 602 (1975). (Summary judgment granted in favor of defendant on plaintiff's claim that defendant negligently repaired plaintiff's car, where only damages were to the car itself).

There is no doubt that West Virginia law does not allow a cause of action for economic losses based on negligent repair. As this Court has properly recognized, the same rationale expressed by the West Virginia Supreme Court in *Star Furniture Company, supra,* which precludes recovery for economic losses under a strict liability theory, also prohibits a negligence cause of action for these damages. *Roxalana Hills,* at 1198. *See also, Hart Engineering Company v. FMC Corporation, supra,* at 1483. Consequently, Kaiser's claim, which is for alleged economic losses only, and based solely on allegations of negligence, must be dismissed.

B. Plaintiff's claim is barred by the applicable statute of limitations.

As the cases cited in the previous section hold, where economic losses result from product ineffectiveness, the Uniform Commercial Code controls. *Roxalana Hills, supra,* at 1196, *Star Furniture Company, supra,* at 859. Therefore, West Virginia's codification of the Uniform Commercial Code warranty statute of limitations § 46-2-725 controls

this action and provides that warranty action must be brought within four years from tender of delivery of the goods, (unless the warranty explicitly extends to the future performance of the goods, a condition which is not applicable here). W. Va. Code § 46-2-725 (1964). Assuming *arguendo,* that Westinghouse breached its contract with Kaiser in repairing the new rotor in May of 1981, this cause of action accrued *at that time, regardless of Kaiser's lack of knowledge of the breach,* and expired in May of 1985. W. Va. Code § 46-2-725(2) (1964). Kaiser instituted this action in November of 1988, three and a half years after the statute of limitations expired. Thus, this action is untimely and should be dismissed.

III. CONCLUSION

West Virginia law does not permit the recovery in tort of economic losses like those which Kaiser seeks. To allow Kaiser's claim would vitiate the warranty provisions of the Uniform Commercial Code. Consequently, the Compliant should be dismissed as failing to state a claim upon which relief can be granted. Even if West Virginia recognized the cause of action which Kaiser asserts, that action would be governed by the four-year warranty statute of limitations set forth in the Uniform Commercial Code. The Complaint, having been filed more than four years after tender of deliver of the goods and the alleged negligent conduct, is therefore barred under the applicable statute of limitations, and should be dismissed with prejudice.

WESTINGHOUSE ELECTRIC
CORPORATION,

By Counsel

/s/ Shawn P. George
SHAWN P. GEORGE
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Charleston, West Virginia 25322

CERTIFICATE OF SERVICE

I, Shawn P. George, one of the attorneys for the defendant herein, do hereby certify that I have served the within DEFENDANT WESTINGHOUSE ELECTRIC CORPORATION'S MOTION TO DISMISS and DEFENDANT WESTINGHOUSE ELECTRIC CORPORATION'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS on the plaintiff by depositing true and exact copies thereof in the United States Mail, postage paid, addressed to the plaintiff's counsel at the address listed below on the 18th day of April, 1989:

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/s/ Shawn P. George
SHAWN P. GEORGE

APPENDIX B

§ 46-2-725. Statute of limitations in contracts for sale.

(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

(3) Where an action commenced within the time limited by subsection (1) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.

(4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this chapter becomes effective [July 1, 1964]. (1963, c. 193.)

APPENDIX C

§ 55-2-12(a). Personal actions not otherwise provided for.

Every personal action for which no limitations is otherwise prescribed shall be brought: (a) Within two years next after the right to bring the same shall have accrued, if it be for damage to property; (b) within two years next after the right to bring the same shall have accrued if it be for damages for personal injuries; and (c) within one year next after the right to bring the same shall have accrued if it be for any other matter of such nature that, in case a party die, it could not have been brought at common law by or against his personal representative. (Code 1849, c. 149, § 11; Code 1860, c. 149 § 11; Code 1868, c. 104, § 12; 1882, c. 102, § 12; Code 1923, c. 104, § 12; 1949, c. 2; 1959, c. 2.)

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

AT PARKERSBURG

KAISER ALUMINUM &
CHEMICAL CORPORATION,
a Delaware corporation,

Plaintiff,

v. Civil Action No. A:88-1512

WESTINGHOUSE ELECTRIC
CORPORATION,
a Pennsylvania corporation,

Defendant.

ANSWER

Defendant, Westinghouse Electric Corporation, a corporation ("Westinghouse"), by counsel, answers the Complaint as follows:

FIRST DEFENSE

The Complaint fails to state a cause of action against Westinghouse upon which relief may be granted.

SECOND DEFENSE

1. Westinghouse is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 1, 3 and 4 of the Complaint and demands strict proof thereof.

2. Westinghouse admits the allegations in paragraphs 2, 5, 6 and 7 of the Complaint.

3. Westinghouse admits that portion of paragraph 8 of the Complaint which alleges that plaintiff purchased from Westinghouse a stator component and a rotor/shaft component. Westinghouse denies the remaining allegations of paragraph 8 of the Complaint.

4. Westinghouse admits that portion of paragraph 9 of the Complaint which alleges that Westinghouse delivered a stator (serial #S.O.88P636) and a rotor/shaft (serial #S.O.88P637) to plaintiff in 1979 pursuant to plaintiff's order of 1976. Westinghouse is without knowledge or information sufficient to form a belief as to the remaining allegations of paragraph 9 of the Complaint and demands strict proof thereof.

5. Westinghouse admits the allegations in paragraph 10 of the Complaint.

6. Westinghouse admits that portion of paragraph 11 of the Complaint which alleges that plaintiff experienced problems on or about April 27, 1981, with the motor generator set. However, Westinghouse denies that the stator or rotor/shaft caused the problems or were responsible for the "malfunction".

7. Westinghouse admits that in May of 1981 it obtained the rotor/shaft component and repaired it at its facility in Round Rock, Texas. Westinghouse denies the remaining allegations in paragraph 12 of the Complaint.

8. Westinghouse denies the allegations in paragraphs 12, 14, and 15 of the Complaint.

9. Westinghouse is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 16, 17 and 19 of the Complaint and demands strict proof thereof.

10. Westinghouse denies the allegations in paragraphs 18 and 20 of the Complaint and specifically denies that it is liable to plaintiff for any sum, plus interest, costs and expenses.

11. Westinghouse denies each and every allegation of the Complaint not herein specifically admitted.

THIRD DEFENSE.

This action is barred by the applicable statutes of limitations.

FOURTH DEFENSE

The incident and damages, if any, of which plaintiff complains are barred or limited by the doctrines of contributory negligence, comparative negligence and assumption of the risk.

FIFTH DEFENSE

The incident and damages, if any, of which plaintiff complains were caused by an act or failure to act by persons, firms or corporations other than Westinghouse, which bars plaintiff's recovery against Westinghouse.

SIXTH DEFENSE

This action is barred by plaintiff's alteration, misuse, abuse, abnormal use or other handling of the motor generator set and/or its component parts which bars plaintiff's recovery against Westinghouse.

SEVENTH DEFENSE

Plaintiff's damages, if any, are barred or limited by plaintiff's failure to mitigate.

EIGHTH DEFENSE

In the alternative, Westinghouse avers that the purchase and sale of the stator component and rotor/shaft component are governed by the provisions of the Uniform Commercial Code, as enacted in the Code of West Virginia in Chapter 46-2-101 *et seq.* As such, Westinghouse asserts each and every defense available to it under the Code and the common law of West Virginia.

NINTH DEFENSE

Westinghouse asserts each and every affirmative defense available to it under Rule 8(c) of the Federal Rules of Civil Procedure, including, but not limited to: accord and satisfaction, estoppel, failure of consideration, laches, the statute of frauds and waiver.

TENTH DEFENSE

Westinghouse avers, that pursuant to Rules 9(a), 17 and 19 of the Federal Rules of Civil Procedure, that

plaintiff is not the real party in interest in this action and lacks the capacity to prosecute it, which may only be remedied by the addition or substitution of the real party in interest, which Westinghouse believes is plaintiff's insurer.

WHEREFORE, Westinghouse prays that the Court dismiss the Complaint and grant Westinghouse its costs incurred.

WESTINGHOUSE ELECTRIC CORPORATION
a Pennsylvania corporation

By Counsel

/s/ Shawn P. George
ROBERT L. ELKINS
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CERTIFICATE OF SERVICE

I, Shawn P. George, one of the attorneys for the defendant, Westinghouse Electric Corporation, a Pennsylvania corporation, certify that I have served the Answer of Westinghouse Electric Corporation upon all counsel of record by forwarding a true and exact copy thereof to them in properly stamped and addressed envelopes deposited in the regular course of the United States mail this 17th day of January, 1989, as follows:

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/s/ Shawn P. George
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No. 92-1503

Supreme Court, U.S.
FILED
MAY 5 1993
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

Kaiser Aluminum and Chemical Corporation, a Delaware corporation,

Petitioner,

vs.

Westinghouse Electric Corporation, a Pennsylvania corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY BRIEF

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Supreme Court Rule 15.6 2

Pursuant to Sup. Ct. R. 15.6, petitioner hereby submits its reply to arguments first raised in respondent's opposition brief. In an effort to divert attention from the Rule 8 and First Amendment issues that are central to petitioner's Writ, respondent has raised West Virginia's statutes of limitations for negligence and contract actions as a means of justifying the decisions of the district court and circuit court to dismiss petitioner's action for negligent repair. Respondent's reliance is misplaced.

Westinghouse has attempted to create harmless error by arguing that Kaiser's negligent repair claims are barred by the two-year statute of limitations prescribed for negligence actions by West Virginia Code § 55-2-12(a) (1981 Rep. Vol.). That issue was never raised by respondent in its motion to dismiss under Rule 12(b)(6) and it was never considered by the district court. Consequently, it is not properly before the Court. Not

only is it grossly inappropriate to raise this limitations statute now, respondent's contention that it has any application to the facts of this case is totally devoid of merit.

As pled in petitioner's complaint, the subject rotor was negligently repaired by respondent in April 1981. It was then placed in storage at petitioner's plant until December, 1987. (Complaint, ¶¶ 12, 15, Appendix D, Tab 2.) On December 3, 1987, the "repaired" rotor was installed in petitioner's motor generator set and energized. It failed immediately, resulting in property damage and business interruption losses. (Complaint, ¶¶ 16-19, Appendix D, Tab 2.) Petitioner's action was timely commenced in November, 1988.

In Howard v. United Fuel Gas Co., 248 F. Supp. 527 (S. D. W. Va. 1965), the plaintiff brought an action for personal injuries and property damage based upon a

theory of negligent installation of gas piping. The piping was installed in 1953-1955, and had presumably began to leak then. However, the explosion and ensuing damages did not occur until 1963. In determining that the action was commenced within the applicable statute of limitations, the court held that the cause of action did not accrue until damages were sustained. Id. at 531; accord, Steeley v. Funkhouser, 169 S.E.2d 701, 702 (W. Va. 1969); State ex rel. Ashworth v. State Road Com., 128 S.E.2d 471 (W. Va. 1962). Likewise, petitioner's cause of action accrued on December 3, 1987, when massive electrical failures caused by respondent's negligent repair of the subject rotor resulted in property damage. Consequently, this action for negligent repair was commenced well within the time limits established by West Virginia Code § 55-2-12(a).

Respondent has also discussed the four-year statute of limitations for contracts for sale established by West Virginia's version of the Uniform Commercial Code, West Virginia Code § 46-2-725 (1966), in a further effort to deter the Court from the broader issues raised by petitioner. Contrary to respondent's quotation from the Fourth Circuit's Opinion, this "suit" does not arise "from a sale to a customer-purchaser by a manufacturer of an article to be manufactured pursuant to certain requirements." Circuit Court Decision, Petitioner's Appendix A, Tab 3, p. 9; Respondent's Opposition Brief, p. 11. As respondent well knows, and as the complaint clearly sets forth, the gravamen of petitioner's cause of action is the conduct of Westinghouse as a provider of repair services several years after it manufactured the subject rotor. As the court stated in Howard, supra: "Faulty workmanship implies negligence--not a breach of contract." 248

S.E.2d at 532. Clearly, this action is based upon the negligent provision of services, not the sale of goods. There is no claim that the subject rotor was in a defective condition when it left the manufacturer in 1978 or 1979. Rather, petitioner claims the malfunction was caused by respondent's negligent conduct in the role of repairman in 1981. Accordingly, the statute of limitations regarding the sale of goods provided by West Virginia's version of the Uniform Commercial Code has absolutely no application to petitioner's cause of action.

The circuit court's unwillingness to distinguish the repair services provided by respondent in 1981 from the condition of the subject rotor when sold two to three years earlier provides still another example of how far the Fourth Circuit was prepared to go to dismiss a West Virginia cause of action of which it apparently disapproved. Moreover, it is deplorable that respondent has chosen to rely on out-of-context, misleading

quotations concerning petitioner's prior discussion of Star Furniture Co. v. Pulaski Furniture Co., 297 S.E.2d 854 (W.Va. 1982) in a shameless effort to confuse the record. Opposition Brief at p. 9.

Contrary to respondent's contention, petitioner's position regarding Star Furniture has been consistent throughout. Star requires a sudden and calamitous event as a requisite element of a strict liability claim for property damage and/or business interruption losses. 297 S.E.2d at 859. Any application of Star to petitioner's negligent repair cause of action should be limited solely to the question of whether the sudden and calamitous event criterion should be extended from strict liability claims to negligent repair claims. If so, petitioner has abundant evidence to prove that the failure of the rotor on December 3, 1987 was a sudden and calamitous event caused by respondent's negligent repair of the rotor. However, it defies logic to suggest

that petitioner's recognition of the possible application of Star for the limited purpose discussed above constitutes a concession that Star applies for all purposes or that petitioner is pursuing a products liability claim.

CONCLUSION

Respondent seeks to divert the Court's attention from the real issues here. No federal court sitting in a diversity action should be free to ignore the plain allegations of a complaint stating an actionable claim under state law by converting that claim into an independent cause of action comprising uniquely different legal elements. Unless litigants in the federal courts can rely on the principle that they alone are empowered to plead the cause of action that provides them with the best opportunity for redress of grievances, the possibility exists for serious abuse of the judicial process. No court should constructively deny

access to the courtroom door by converting a litigant's claims into a different and untenable cause of action.

Dated this 4th day of May, 1993.

Respectfully submitted,

ROBINS, KAPLAN, MILLER & CIRESI

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